(27,046)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 960.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., APPELLANT,

vs.

ELIAS B. WILCOX.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1311.

ELIAS B. WILCOX, Defendant, Appellant,

v.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., Plaintiff, Appellee.

Appeal from the District Court of the United States for the District of Porto Rico from Final Decree (Hamilton, J.), August 25, 1916.

Transcript of Record.

Elias B. Wilcox, for Appellant.
Frank Antonsanti, for Appellee.

Boston: Printed under direction of the Clerk. 1917.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1311.

ELIAS B. WILCOX, Defendant, Appellant,

v.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., Plaintiff, Appellee.

Transcript of Record of District Court.

[Filed in Circuit Court of Appeals October 13, 1917.]

In the District Court of the United States for Porto Rico.

Equity. No. 946.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, PORTO RICO.

v.

ELIAS B. WILCOX.

Foreclosure of Mortgage.

Bill to Foreclose.

[Filed June 9, 1914.]

To the Honorable the Judge of the United States District Court for Porto Rico:

El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, a corporation created by and existing under the laws of Porto Rico, and a resident and citizen thereof, brings this its bill of complaint against Elias B. Wilcox, who is a citizen of the United States, a lawyer, married to Mrs. Vasdaman Cockrel, and a resident of Toa Baja, and thereupon your orator complains and says:

2 I. That by virtue of a deed dated the twenty-ninth day of July, 1909, executed in the city of San Juan, before Notary Public Damian Monserrat y Simo, Rafael Lopez Landron and his wife Mrs. Ana Maria Gutierrez Igaravidez did make and execute a mortgage in favor of your orator for the sum of $4,000 as principal, interest at 1 per cent per month, and for the term of one year. A copy of said deed is hereby attached and made a part hereof and marked "Exhibit A."

The interest was to be paid in advance every four months, it being one of the conditions that whenever the debtor should fail to pay the

interest so agreed the mortgage should be considered as having expired and the mortgagee was free to foreclose the same.

It was also agreed that the mortgagor was bound to keep the property on which the mortgage was given insured for the amount of the mortgage. And additional liability of $500 was imposed upon the mortgagors for the payment of costs and attorney's fees in case it should become necessary to institute judicial proceedings to effect the collection of the mortgage debt.

That in order to secure the payment of the said amount of money, plus the additional sum for attorney's fees and costs, the said Rafael Lopez Landron and his wife Ana Maria Gutierrez charged the property hereinafter described with the said lien.

The above mortgage was registered in the Registry of Property of San Juan, Section 1st, at folio 217, volume 58 of San Juan, property No. 2115 duplicate, 10th inscription.

II. And your orator alleges that the said mortgage has not been paid or cancelled neither totally nor partially, and there is due to your orator the interest on same from August 3, 1913, to March 3, 1914, amounting to $322.

III. And your orator further alleges that by virtue of another deed executed before Notary Public Damian Monserrat y Simo, under date of December 3, 1912, the said Rafael Lopez Landron and his wife Ana Maria Gutierrez did make and execute in favor of complainant a further and additional mortgage for the sum of $1,700 principal, interest at 1 per cent per month, and for the term of one year, which expired on December 3, 1913. A copy of said deed is
3 hereby attached and made a part hereof, marked "Exhibit B." It being agreed between the parties that the interest was to be paid in advance every four months, with the condition that upon default of payment of said interest as agreed the mortgage should be considered as having expired and the mortgagee free to foreclose. The mortgagor under said mortgage being bound under the agreement to keep the property insured for the exact amount of the mortgage debt, which he has failed to do, wherefore your orator has been obliged to pay for the insurance premiums the sum of $108.68. An additional sum of $200 was stipulated to pay costs and attorney's fees in the case of a foreclosure being necessary. The same property being charged with this lien.

This mortgage is registered in the Registry of Property at San Juan, Section 1st, at folio 72, volume 24 of Santurce, property No. 2115 triplicate, 10th inscription.

IV. And your orator further alleges that this mortgage has not been paid or cancelled and that there is due to your orator the interest thereon from August 3, 1913, to March 3, 1914, amounting to the sum of $119.

V. The property charged with the above liens is described as follows, to wit:

"A house and lot situated on Park Street (Calle del Parque o tren Electrico) in the Northern section of the barrio of Santurce, this city. The house is made of wood, consists of two stories and is roofed with zinc, measuring 15 meters in length by 32 in width (fondo) and the

lot measures on the East, 41 meters in length; on the North, and enjoining another plot of land belonging to Mr. Rafael Lopez Landron, it measures 51 meters and 50 meters; on the South also adjoining land of Mr. Rafael Lopez Landron, it measures 51 meters and 50 centimeters, and on the West adjoining once more lands of the said Rafael Lopez Landron formerly Belen Requena, 42 meters and 50 centimeters."

VI. And your orator further alleges that by virtue of another deed executed before Notary Public Damian Monserrat y Simo, under date of January 14, 1913, Rafael Lopez Landron and his wife Ana Maria Gutierrez, the original mortgagors, sold the property hereinbefore described under paragraph V. hereof to the defendant, Elias B. Wilcox, who assumed the said debts and acknowledged and confessed in the said deed his obligation to pay the mortgage liens imposed on the property by the vendors hereinbefore referred to.

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The said deed of sale was registered in the Registry of Property at folio 73, Volume 24 of Santurce, property number 2115, 13th inscription, the said defendant being today the owner of the said property. A copy of said deed is hereby attached and made a part hereof marked "Exhibit C."

VII. And your orator further alleges that there is now due and owing from the defendant unto the complainant the following sums, to wit:

Principal on first mortgage mentioned herein and hereto attached marked "Exhibit A"	$4,600.00
Interest on the above account from August 3, 1913, to March 3, 1914	322.00
Additional sum stipulated for attorney's fees and costs	500.00
Principal on second mortgage described herein and hereto attached and marked "Exhibit B"	1,700.00
Interest on the above sum from August 3, 1913, to March 3, 1914	119.00
Additional sum stipulated for attorney's fees and expenses	200.00
Insurance premium paid by your orator and which should have been paid by defendant	108.68
Total sum owed by defendant	$7,549.68

And your orator charges that no part of the aforesaid sum of money or the interest accruing on the principal since the said third day of March, 1914, has been paid, but the same is still owing to it, although the time limited for the payment thereof by the conditions aforesaid has elapsed, and payment thereof has been duly demanded of the said defendant.

To the end, therefore, that the said Elias B. Wilcox, the defendant, may answer the several matters and things hereinbefore stated, as fully and particularly as if they were herein again repeated

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and he was thereunto especially interrogated, and that the premises aforesaid may be sold for payment of your orator's

claim, with interest as aforesaid, and that your orator may have such further or other relief in his case may require;

May it please your Honor to grant unto your orator a writ of subpœna in chancery against the said Elias B. Wilcox, of Toa Baja, commanding him to appear in this court at some certain day to be therein named, and to answer the premises and abide by and perform such decree as may be passed therein.

DAMIAN MONSERRAT, Jr.,
Solicitor for Complainant.

Damian Monserrat y Simo, being duly sworn, under oath states that he is the president of the plaintiff corporation and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

DAMIAN MONSERRAT.

Sworn and subscribed to before me this ninth day of May, 1914, by Damian Monserrat y Simo, resident of San Juan.

[SEAL.] ANTONIO AGUAYO, *Clerk.*

Answer.

[Filed July 20, 1914.]

This defendant, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill, comes and answers thereto, or so much thereof as he is advised is material to be answered, and says:

1. That defendant has no certain knowledge of the allegations made in the introductory paragraph of the bill as to the plaintiff's being a corporation and residence in Porto Rico, and has no knowledge as to same and therefore demands proof thereof, but as to the allegations of defendant's citizenship and residence, defendant admits said allegations.

6 2. As to the allegations contained in paragraphs one, two, three, four and five, wherein it is alleged that Lopez Landron and his wife made two mortgages in favor of plaintiff, one for $1,600 and one for $1,700, the same having been registered, and no part of the interest or principals having been paid, defendant has no certain knowledge of said allegations, and therefore denies each and all of the allegations contained in said paragraphs, and demands proof of the same.

3. That as to the allegations contained in paragraph sixth of said bill, wherein it is stated that the property described in paragraph fifth of said bill was sold to defendant by Rafael Lopez Landron and his wife, defendant admits that a deed of sale was made out in favor of defendant, but only for the purpose of guaranteeing to defendant and his law partner, Willis Sweet, a certain sum of money owed them by the said Lopez Landron, and at the suggestion and insistence of the plaintiff in this action, through its president, Damian Monserrat y Simo, who claimed that said bank had a prior

unpaid mortgage on the said property, with the understanding that defendant should endeavor to sell the property for a sum that would pay the bank its claim as well as that of defendant and the said Willis Sweet, and defendant, even with the agreement above stated, denies that he obligated himself at any time to pay the amount due the said bank by Lopez Landron. And defendant says if a fair translation of the Spanish wording in said deed justified such construction, then defendant says that such was not the agreement and that he was mistaken in his understanding of the meaning of the Spanish wording of said deed. The defendant has a fair knowledge of the Spanish language, but not such that he might not have been misled and mistaken by the use of legal terms in an instrument written in the Spanish language, but says that, even with the understanding and for the purpose mentioned above, the said deed was to have been prepared and written so as to provide that defendant should take the said property subject to said claim, but said sale was made with the consent and at the suggestion of said plaintiff only for the purpose above stated.

Wherefore, having thus made full answer to all the matters
7 and things contained in said bill, this defendant prays to be dismissed hence with his costs in this behalf incurred.

San Juan, P. R., July 18, 1914.

WILLIS SWEET,
Solicitor for Defendant.

Personally appeared before the undersigned authority the defendant in the above-named case, who, being duly sworn, says that he is the defendant in the above cause and that the matters and things contained in this answer are true, except as to those things stated upon information and belief, and as to those matters he believes it to be true.

E. B. WILCOX,
Defendant.

Sworn to and subscribed before me on this the twentieth day of July, 1914, in San Juan, Porto Rico.

[SEAL.]

A. AGUAYO,
Clerk of said Court.
By L. A. GROSS,
Deputy Clerk.

Cross-bill.

[Filed July 20, 1914.]

To the Honorable Peter J. Hamilton, Judge of the District Court of the United States for Porto Rico:

Elias B. Wilcox, a citizen of the United States of America, residing in Toa Baja, Porto Rico, brings this his cross-bill against El Banco Popular de Economias y Prestimos de San Juan, P. R., a corporation organized under the laws of Porto Rico, and doing business in

the said Island of Porto Rico, with its principal office in the city of San Juan, Porto Rico.

And therefore cross-complainant complains and says:

1. That some three years ago the said E. B. Wilcox, together with Willis Sweet, under the firm name of "Sweet & Wilcox," attorneys-at-law, rendered certain legal services to Rafael Lopez Landron for the stipulated fee of $1,500, which was never paid, except a small part thereof, although in a settlement made of the litigation
8 in question the said Rafael Lopez Landron, among other concessions, demanded to be paid the sum of one thousand dollars, with which he was to pay his attorney's fee, which amount was paid him under said statement, but which was never wholly nor in part paid to his said attorneys, Sweet & Wilcox. After making many demands upon the said Landron for the payment of same, the said law firm, Sweet & Wilcox, brought an action for the amount due them in this court and secured herein a judgment for something over eleven hundred dollars and costs. Because of the importunities of the said Lopez Landron, they refrained from executing their judgment upon a certain house and lot owned by him in Santurce, which complainant says is the same property which is described in cross-defendant's bill, and in lieu of the judgment obtained, as above stated, accepted the proposition of the said Landron to make in their favor eleven promissory notes of the value of one hundred dollars each and one for some sixty-five dollars, without interest, the first payable at the end of the first month, the second payable at the end of the second month, and so on throughout the series until all were paid, with the proviso that if there should be default in the payment of any of said notes, that said default would mature the entire obligation, and to guarantee the payment of said notes the said Landron constituted a mortgage upon the house and lot above mentioned, which was duly registered, and same was a second mortgage upon said property, the said Banco Popular, cross-defendant, having a first mortgage thereon for the sum of $4,600, so cross-informant has been informed and believes. Cross-complainant further says that the said Lopez Landron never paid any of said notes, nor any part thereof, and that after many efforts to collect same the said Sweet & Wilcox brought a suit in this court to foreclose their mortgage on the premises above named, which was duly decreed by this court; as the said Sweet & Wilcox were about to execute upon the said premises, Mr. Damian Monserrate y Simo, then as now the president of the cross-defendant bank, came to cross-complainant E. B. Wilcox claiming that said bank held a prior mortgage upon the said premises of Lopez Landron for the sum of $4,600, and stated
9 further that he was a friend of the said Landron; that he would be very sorry to see his property sold under mortgage, involving the publication of notices of sale of his property in the press; that same would very much injure and humiliate him; that it was painful to see one lawyer sued by his brother lawyers, and stated that in order to prevent this that he would suggest that the said Landron transfer to Sweet & Wilcox the said property, and that it would be generally understood that he had sold same and in this way he

could be saved the damage and embarrassment which a public mortgage sale would cause him, and that said transfer would guarantee to Sweet & Wilcox the amount of their debt, and that later said property could be disposed of at private sale for a sufficient sum to satisfy the above-named claim of said bank and that of Sweet & Wilcox, as said property was easily worth sufficient to do this, and that the bank would engage itself to look for purchasers as also cross-complainant would, and that for certain reasons cross-complainant could better sell the said property than could the said Lopez Landron.

2. And cross-complainant further says that because of the statement of the said Damian Monserrate, speaking for and in the interest of the bank, cross-complainant agreed to take over the said property, not as the real owner of the same nor to become responsible for the payment of the debts of the said Landron with which said property was charged, holding priority over his mortgage and that of Willis Sweet, but rather as an agent to sell the same, with the assistance of the said bank, in order that the amount might be realized sufficient to pay off the bank's prior mortgage and that of Sweet & Wilcox, and to carry out this agreement the said Damian Monserrate, acting as a Notary Public, drew a deed in the Spanish language, which was a lengthy document, and having every confidence that the instrument mentioned expressed therein the agreement above stated which was entered into between Damian Monserrate y Simo in the interest of said bank, as its president, Rafael Lopez Landron and cross-complainant, cross-complainant signed the said instrument, which, if he read it at all, was read by him very hastily, and which he believed contained, as above stated, the agreement above named and set out.

3. Cross-complainant further says that it was understood that upon the face of the said instrument it was to appear that the said property should appear to have been sold to cross-complainant and to be held by him *him* subject only to the bank's prior mortgage of $4,600, and that there was to have been nothing in said instrument which obligated the said E. B. Wilcox to become responsible out of any property for the payment of the said amount, only so far that the same could be realized from the sale of said property, and cross-complainant says that if said document contains anything that can be in law construed to give the said bank any right to move other property of the said Wilcox, such provision is in contravention of the agreement above named and expressed, and cross-complainant did not so understand said document. Cross-complainant says that he is informed and believes, and therefore states upon information and belief, that the said bank is not only seeking to foreclose its mortgage, but in case the public sale of the said property is not sufficient to pay the amount for which it sues, that it will seek to make good such *sufficiency* from other property of cross-complainant.

4. Cross-complainant further says that the date upon which the said bank's mortgage of $4,600 was registered was August 3, 1909, that the date upon which the mortgage held by Sweet & Wilcox was registered was July 10, 1912, and now it appears that thereafter the said Lopez Landron constituted a third mortgage upon the same

premises, being the second to said bank, for the sum of $1,700, which was made and signed on the 3d of December, 1912, and registered on the 28th of January, 1913, coming after, therefore, in priority, the mortgage of Sweet & Wilcox, and yet in the deed by which said Wilcox took over said premises, the mortgage clause of which the said bank is seeking to foreclose in this suit, the last named mortgage is therein recited and the said bank seeks to obligate the said Wilcox not only to pay the first mortgage of $4,600 in favor of said bank, but the third mortgage as well for $1,700, which came in
11 priority after that of Sweet & Wilcox, of which said mortgage cross-complainant had no knowledge, nor did he understand was made to appear in said instrument in any way as to make him assume the obligation to pay the same, and now cross-complainant says that the said bank after the agreement above fully set out undertakes to collect by the sale of the said premises the two mortgages above mentioned, interest thereon for two or three years at 12 per cent, together with the sum of seven hundred dollars for attorney's fees, and seeks further as above stated to collect out of other property of the said Wilcox any deficiency that there may be after the sale of the said premises, all of which cross-complainant says is in violation of the agreement above set out, and further cross-complainant says that the said sale or transfer of the said property of the said Landron was without any consideration of value, and said mortgage the basis of this suit is void and of no legal effect.

5. And cross-complainant says further that another reason which said deed and mortgage is null and void is because the said instrument was drawn by Damian Monserrate y Simo, acting as a Notary Public, that he is the president of the said bank, the cross-defendant, and was acting as such in his negotiations with the said Wilcox, that cross-complainant has been informed and believes, and states therefore upon information and belief, that the said Monserrate was at the time of the drawing of the said document by him as Notary Public a stockholder in said bank, as well as its president and attorney-at-law, and further that one, if not both, of the witnesses who appear as signing the said deed and mortgage were at the time in the employ of the said Notary Damian Monserrate y Simo, either of which fact- renders the document null and void under the provisions of Section 20 of the law "Concerning Notaries" in force at the time in Porto Rico, the same being Section 1998 of the Revised Statutes and Codes of Porto Rico. And cross-complainant prays that upon final hearing of this cause that it may be ordered and decreed that the certain mortgage and deed above mentioned, a certified copy of which is hereto attached marked "Exhibit A" and is made a part of this cross-bill, be null and void and without effect in law, that the registration of same be also declared to be null and void, and
12 for such general relief as may to the court be deemed just and equitable.

And to the end that the cross-complainant may obtain the relief prayed herein he further prays the court to grant him process by subpœna directed to El Banco Popular de Economias y Prestimos de San Juan, Porto Rico, the cross-defendant herein named, command-

ing said bank to appear and answer, but not under oath, the same being waived, all of the allegations of the cross-bill herein filed.

WILLIS SWEET,
Solicitor for Cross-Complainant.

Personally appeared before the undersigned authority the cross-complainant in the above-named cause, who, being duly sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing cross-bill and knows the contents to be true, except as to those matters and things stated therein on information and belief, and as to these he believes them to be true.

E. B. WILCOX,
Cross-Complainant.

Subscribed and sworn to before me on this twentieth day of July, 1914, in San Juan, Porto Rico.

[SEAL.]

A. AGUAYO,
Clerk of said Court.
By L. A. GROSS,
Deputy Clerk.

Motion to Strike.

[Filed August 3, 1914.]

Comes now the complainant, the Banco Popular de Economias y Prestamos de San Juan, Porto Rico, and respectfully shows unto this Honorable Court:—

That the answer herein filed by the defendant is insufficient in equity and in law as a defence to the complaint herein filed and therefore prays that said answer be stricken from the record in this cause and that a decree pro confesso be entered herein.

San Juan, P. R., July 28, 1914.

DAMIAN MONSERRAT, JR.,
Solicitor for Complainant.

13 Notified with service of copy.
E. B. WILCOX, *Defendant.*

August 1, 1914.

Motion to Strike.

[Filed August 3, 1914.]

Comes now the complainant and respectfully shows unto your Honor that the defendant in this case filed herein his answer to the complaint on the twentieth day of July, A. D. 1914, and that on the same day and in the same cause the said defendant did file a so-called cross-bill, setting up alleged new facts and praying affirmative relief.

And the complainant herein shows unto your Honor that said so-called cross-bill is not a proper pleading to be filed in this case by the defendant because any defence which the defendant should desire to present should be asserted by way of a counter-claim and as part of the answer.

Wherefore the complainant prays that the so-called cross-bill be stricken from the files herein.

San Juan, P. R., July 29, 1914.

DAMIAN MONSERRAT, JR.,
Solicitor for Complainant.

Notified with service of copy.
E. B. WILCOX, *Defendant.*

August 1, 1914.

Journal Entry.

July 28, 1915.

The court having duly considered the motion to strike the answer and motion to strike the cross-bill, heretofore heard and submitted, rendered this day an opinion, and in accordance therewith it is ordered and directed that both motions be and are hereby denied.

14 *Motion for Decree pro Confesso.*

[Filed October 26, 1915.]

It appearing that on July 20, 1914, the defendant herein filed his cross-bill, and that same was duly served upon the above-named plaintiff; that thereafter the plaintiff filed a motion to dismiss the said cross-complaint, and that on July 28, 1915, after argument by counsel of the parties herein, the court denied said motion.

It further appearing that no demurrer, plea nor answer to said cross-complaint has been filed to date, although same should have been filed before the rule day of the month of September last.

Wherefore the defendant herein prays the court for a decree pro confesso upon said cross-bill.

San Juan, P. R., October 25, 1915.

E. B. WILCOX,
For Defendant.

Motion for Dismissal.

[Filed November 15, 1915.]

Now comes the plaintiff herein by its attorneys, Damian Monserrat, Jr. and Joseph Anderson, Jr., and moves the court that the

so-called answer heretofore filed by the defendant be dismissed for the following reasons:

1. That said answer does not present a defence to the action of foreclosure which it pretends to answer neither in accordance with the Mortgage Law and its Regulations of Porto Rico nor in fact.

2. That said answer does not state facts sufficient to constitute a defence either at law or in equity.

3. That same is not drawn in accordance with the provisions of Rule 30 of the Supreme Court of the United States for practice in courts of equity of the United States.

Wherefore the plaintiff prays the court that the alleged answer be dismissed.

San Juan, P. R., November 13, 1915.

JOSEPH ANDERSON, JR.
DAMIAN MONSERRAT, JR.

15 *Motion to Dismiss Cross-bill.*

[Filed November 15, 1915.]

Now comes the plaintiff herein and moves the court that the so-called cross-bill heretofore filed herein be dismissed for the following reasons:

1. That same is not in substance *of* form a cross-bill but contains only such matter as should and might have been set up in the answer, if proper defence, in accordance with Rule 30 of the equity rules.

2. That if a cross-bill, the filing of which is not allowed under the present equity rules, it is defective as to parties inasmuch as Senor Don Rafael Lopez Landron and his wife are not made parties thereto.

3. That it contains no matter which is a basis for affirmative relief, nor does the prayer ask for any affirmative relief nor any further relief than could and would be granted on an answer if the so-called defences could be heard and considered in such a case.

Wherefore the plaintiff prays that the said cross-bill be dismissed.

San Juan, P. R., November 13, 1915.

DAMIAN MONSERRAT, JR.
JOSEPH ANDERSON, JR.

Journal Entry.

November 22, 1915.

This cause is heard by the court upon the defendant's motion to dismiss the complaint, and for a decree pro confesso upon his cross-bill, and upon plaintiff's motion to dismiss the answer and for a dismissal of the cross-bill of defendant.

The matter is submitted and the plaintiff is allowed five days to file a brief and the defendant five days thereafter to reply.

16 *Journal Entry.*

January 27, 1916.

This cause was heretofore heard by the court and submitted upon various motions of the respective parties. The court this day renders an opinion in the premises and orders and directs that the defendant's motion to dismiss the bill be and the same hereby is denied and the plaintiff's motion to dismiss the answer and to dismiss the cross-bill be and the same are granted unless they are amended within ten days to meet the views expressed in said opinion.

It is further ordered and directed that the motion for a decree pro confesso upon the cross-bill be and the same is hereby denied.

The respondent takes an exception to the ruling of the court in the premises.

Opinion of District Court.

January 28, 1916.

Equity Pleading.

Mr. Willis Sweet for Plaintiff.

Messrs. Damian Monserrat, Jr., and Joseph Anderson, Jr., for Defendant.

HAMILTON, *J.*:

The original pleading in this litigation was filed in a local court and the case was removed to the Federal court, where a bill to foreclose was filed June 9, 1914, designed to conform to Federal equity practice. The bill alleges that on July 29, 1909, one Rafael Lopez Landron and wife executed a mortgage for one year to the plaintiff for fifty-six hundred dollars, together with interest and attorney's fees, and that the mortgage was duly registered at San Juan. That on December 3, 1912, the said grantors executed a further mortgage to plaintiff for seventeen hundred dollars, also for one year, with similar stipulations. This mortgage was also registered at San Juan. That the mortgaged property in question consists of a house and lot on Park Street in Santurce, and that on January 14, 1913, the said Landron and wife sold the property to defendant Wilcox by
17 a deed which assumed the debts and mortgage liens, which deed was also duly recorded at Santurce. That the total sum at the time of the filing of the bill amounted to seventy-five hundred and forty-nine and 68/100 dollars, and was due and unpaid.

On July 20, 1914, defendant Wilcox filed an answer denying many of the allegations of the bill, but alleging that the deed to him was made as an accommodation to both the plaintiff and to Landron in order to prevent a forced sale of the property under judgment obtained by the defendant and his partner, Willis Sweet,

and that some of the provisions of the written instrument did not carry out the agreement made, defendant having only a fair knowledge of the Spanish language. On the same day defendant also filed a cross-bill, setting out many of the same facts in greater detail, and in particular that he had no knowledge that he was to assume the mortgages claimed. That the mortgage is null and void under Section 1998 of the Revised Statutes of Porto Rico, because it was drawn by the president of the plaintiff company acting as a Notary Public, and because said Monserrat is also a stockholder in said bank. The prayer of the cross-bill is that the mortgage and its registration be declared null and void, and for general relief.

On November 15 plaintiff filed a motion to dismiss the answer because it states no defence either under the Mortgage Law or in equity, and is not drawn in accordance with Equity Rule No. 30, and also to dismiss the cross-bill because it contains only matter which should have been set up in an answer, is defective as to parties in omitting Landron and wife, and seeks no relief other than a defence. On October 26 defendant files a motion for decree pro confesso upon the cross-bill and also a motion to dismiss the bill of complaint because of lack of replication.

1. The matter of decree pro confesso is not pressed, although it is not conceded that the New Equity Rules abolish the necessity for replication. In point of fact, under Equity Rule 31 if the answer includes a set-off or counter-claim, the reply is required within ten days, and in default thereof a decree pro confesso may be entered as in default of an answer to the bill. However, as this motion is not insisted upon, it is considered waived.

2. Plaintiff, however, contends that the alleged cross-bill
18 should be dismissed on the ground that Equity Rule 30 dispenses with that pleading for the future, and limits the equity pleading in that regard to set-off or counter-claim expressed in the answer itself. It may be doubted whether the New Equity Rules go so far as to abolish cross-bills, although undoubtedly the rules lessen their frequency. In 29 Harvard Law Review, 55, it appears that the New Equity Rules have been construed differently in different jurisdictions. In some districts some of the rules are enforced to a very limited extent, and the whole subject is as yet in an unformed condition. The rules were effective February 1, 1913, and the Federal Reporter since that time shows a number of decisions based upon cross-bills. For instance in United States v. Woods, decided as late as April 28, 1915, there is a cross-bill. It is there held that under Equity Rule 30 the cross-bill is not in the nature of a counter-claim, and the cross-bill was dismissed in the District Court and this was affirmed in the Circuit Court of Appeals. The propriety of setting up a set-off or counter-claim by a cross-bill, however, is not questioned. The point is, perhaps, not material, as the new rules are designed to make the practice simple and more flexible, so that if a paper labelled a cross-bill should more properly have been made a part of the answer, this course might be pursued.

3. The defendant, however, sets up that the motions to dismiss answer and cross-bill are but repetitions of what was formerly

sought under a different name and decided adversely by the court on July 28 as motions to strike the same papers. This, however, does not follow. A motion to strike is based upon grounds which do not obtain in a motion to dismiss. The first motion relates generally to formal matter, while the latter takes the place of the old demurrer and is decided upon questions of law or equity. It would seem better, therefore, to decide the case upon the legal points involved.

4. It is claimed by the plaintiff, however, that even conceding the survival of a cross-bill in equity pleading, it is not appropriate to the case at bar, in that it sets up no equity and is based upon conversations precedent to a written contract. Probably the most
serious point in regard to the answer and so-called cross-bill
19 is that the defence set up is not one contemplated by the Mortgage Law of Porto Rico, which is the law of real property of Porto Rico. Fernandez v. Perez, 6 P. R. Fed. 665, 675; Hesse Newman & Co. v. Ledesma, in this court in manuscript, February 26, 1915. This is under the general principle that the lex loci of the land controls its descent, alienation and transfer, and the instruments effecting such conveyance. The local law enters into the contract as a part of it. Brine v. Ins. Co., 96 U. S. 627. Under that law the summary proceedings cannot be suspended at the instance of any one. Martinez v. Rivera, 6 P. R. Rep. 177; Roca v. Banco Territorial, Id. 339.

The defences which the Mortgage Law and its regulations admit are only forgery, prior title and cancellation. Mortgage Law Regulations, Art. 175. It is true that it has been held in the case of Hesse Newman & Co. v. Ledesma, supra, that a court of equity will admit either defences under proper circumstances. It may well be that one of these is fraud vitiating the contract, for fraud is one of the main grounds of equitable intervention. If the deed from Landron to Wilcox did not contain the contract actually agreed upon, a court of equity would in a proper case entertain the proper pleading to reform the contract. This, however, could probably only be done in a proceeding to which Landron and wife were parties, unless in some way it is shown that the plaintiff had in that regard succeeded to the rights and equities of Landron. As it stands, the defendant's claim would be untenable. The fact that he did not understand Spanish would be no defence available to him in regard to a Spanish deed which he accepted. Conversations before a written contract are held to be merged in it. As long as the contract is left standing it must be enforced. The only way to obviate it is, in some proper way, to have its terms reformed or set aside. The so-called cross-bill seeks to avoid it on the ground of parol conversations beforehand, but these cannot be taken into account. 27 Cyc. 1136.

5. The cross-bill also sets up that "said deed and mortgage" is null and void because the notary was president and a stockholder
of the plaintiff, that one or more of the witnesses were in the
20 employ of said notary, and that, therefore, under the provisions of Section 20 of the Notarial Law of Porto Rico the

conveyance in question is void. The provision is found as Section 1098 of the Official Compilation of the Laws of Porto Rico of 1911, and reads as follows:—

"(1098.) Sec. 20. The following public instruments shall be null and void:

"First. Those in which the notary authorizing same has intervened as a party thereto, or which contain any provision in his favor.

"Second. Where the relatives of the parties concerned therein or the relatives, clerks or servants of the notary authorizing the instruments are witnesses thereto.

"Third. Those in which the notary fails to certify as to his knowledge of the parties, or to supply this deficiency with witnesses of identification, or where the signature of the parties and witnesses, and the signature, mark and rubric of the notary, when requested, do not appear."

The validity of this defence is not at present before the court, and so need not be passed upon. It is to be noted only that, if it be a valid defence, it arises out of the transaction sued on by the plaintiff and is, therefore, within the scope of Equity Rule 30 as to set-off and counter-claim. In other words, it is, if valid, defensive matter and can be set up in an answer and does not need a cross-bill. If it is a good defence, it annuls the conveyance in question. It is true that to give it full effect would require more than the dismissal of the bill of complaint, in that it should be carried into effect by a decree of cancellation. It is quite possible that under the earlier practice a cross-bill would be necessary to uphold such a decree, but the provisions of new Equity Rule 30 admitting set-off and counter-claim as part of the answer must be held to justify appropriate relief in the decree also. It may be that, if the point be a valid one, it would have been set up by an independent suit in equity. Nevertheless, it was not set up as an independent suit in equity, and as it grew out of the transaction sued on it comes within the scope of the new rule. The defendant would gain nothing even if the cross-bill were allowed, for a
21 claim when urged in the shape of a cross-bill, even under the old practice, was merely an auxiliary suit and dependence of the original bill, which, when the bill is dismissed, would share the same fate. Cross v. De Valle, 68 U. S. 1, 14.

It follows, therefore, that the defendant's motion to dismiss the bill of complaint is denied, and that plaintiff's motion to dismiss the answer and to dismiss the cross-bill will be granted unless these are amended within ten days as to meet the views above expressed.

It is so ordered.

San Juan, P. R., January 28, 1916.

PETER J. HAMILTON, *Judge*.

Amended Answer to Complainant's Bill of Foreclosure.

[Filed July 3, 1916.]

Comes now the above-named defendant, Elias B. Wilcox, appearing in his own behalf and by his solicitor, Willis Sweet, and reserving all manner of exceptions that may be had to the many uncertainties and imperfections of complainant's bill herein and answers thereto, or so much thereof as he is advised is material to be answered, and says:—

I. The defendant admits the corporate capacity and residence of the complainant and the residence and citizenship of the defendant as set forth in the second paragraph of complainant's bill.

II. The defendant admits that the mortgage described in the complainant's bill was made, executed and delivered, all as set forth in the said bill of complaint, but as to whether or not the principal or interest, or any portion of either the principal or interest, of the debt secured by said mortage has been paid, the defendant is not fully informed and therefore denies the said allegation as to the matter of payments or amounts due on account of either principal or interest, and demands proof of the same.

III. As to the third allegation of complainant's bill, in which is recited the execution of a second mortgage claimed to have been executed by Rafael Lopez Landron and his wife Ana Maria
22 Gutierrez in favor of complainant for the sum of one thousand seven hundred dollars ($1,700), with the interest as stated, and the payment of which said complainant seeks to charge upon this defendant, the defendant is without definite information, but the defendant believes and charges the fact to be that if such a mortgage was ever executed, the making of the same was not in good faith, nor for the consideration stated, nor for consideration at all; and the defendant bases his belief in this regard upon the following facts: That such a loan, at such a time, that is, with the first mortage for four thousand six hundred dollars ($4,600) *extent* and no portion thereof paid, would not be a bankable transaction; that said pretended mortgage was not recorded for about one year after its pretended execution, which does not correspond to the business methods of any banking institution, nor was the existence of the said mortgage ever noted or recorded in the office of the proper registrar until after the alleged assumption of its payment by the defendant; and the defendant now believes, and charges the fact to be, that with the drawing of the bill of complaint through its attorney, Damian Monserrat, and the meeting with said Landron and Monserrat with this defendant, a scheme had been developed to entrap this defendant into a promise to pay, or assume the payment of, said seventeen hundred dollars ($1,700), and this allegation of belief the defendant bases upon the following facts, in addition to those above stated:—

The defendant, prior to the date of the bill of sale set forth in

said bill of complaint, was the owner of a second mortgage described in said bill of sale for the sum of — hundred and — ($—) dollars, which mortgage he was proceeding to foreclose in this court, and had proceeded so far as to obtain a decree of foreclosure, and was about to proceed with the sale of said property as provided by law when the said Monserrat came to defendant to discuss or devise some plan by which the advertisement and sale of the property of said Landron, who was a fellow lawyer of both Monserrat and defendant and a friend of said Monserrat, might be avoided, upon which suggestion the defendant expressed himself ready and willing to act;

23 defendant further says that thereupon the said Monserrat and the said Landron and this defendant met at the office of Landron in San Juan, then and there to arrange a settlement of said business without further proceedings in court, or more publicity, if possible so to do; that an agreement was made to the effect that this defendant would assume the payment of the said mortgage for the sum of four thousand six hundred dollars ($4,600) and cancel his said judgment, or decree, and that the said Landron for himself and wife agreed to deed said property described in the complainant's bill to defendant, the consideration being the assumption of said debt of four thousand six hundred dollars ($4,600) besides the interest and the full satisfaction of his own debt, to wit, the sum of — ($—) and that no other or further consideration following from this defendant was considered or promised. Defendant further says that thereupon the said Monserrat left said conference with the understanding that he would draw said deed in accordance with said agreement and the defendant and the said Lopez Landron reduced the terms agreed upon to writing, and the said agreement was then and there signed by the said Landron and this defendant, and witnessed by F. C. Timson, who was present when said agreement, or memorandum, was signed; that in due course this defendant was notified by said Monserrat that said deed was ready for execution, and that defendant went to the notarial office of said Monserrat to sign his acceptance of said deed; that said deed was by him accepted, and in this connection the defendant respectfully shows that said bill of sale or deed was written in the Spanish language, and was of great length; that while the defendant might, with his knowledge of said language, have carefully studied said deed and understood its contents, yet he was assured by the said Monserrat that said instrument faithfully stated the agreement as made by said Landron and defendant and in the making of which said Monserrat actively participated, and the defendant having had full confidence in the assurances given him by said Monserrat, and believing that Monserrat fully understood the consideration agreed upon between the parties, accepted the statement of said Monserrat as to the contracts

of said bill of sale, and especially as to the consideration

24 stated therein; that defendant never promised to pay said seventeen hundred dollars, never made any agreement with relation thereto, nor did defendant know of the existence of said mortgage until after said bill of sale was made and accepted by defendant as above stated; nor was any consideration ever passed for

the assumption of the said sum of seventeen hundred dollars secured by said mortgage; nor did the defendant ever enter into any agreement to assume said mortgage.

IV. Further answering said bill of complaint, the defendant charges either a deliberate fraud on the part of complainant, through its president and attorney, the said Monserrat, or, in the alternative, such a mistake on the part of said Monserrat as to nullify said bill of sale, or deed, and as a reason for said belief the defendant states the following facts:

The said Monserrat, who prepared said bill of sale for the signature of defendant, was at the time said deed was prepared the president of the said Banco Popular, corporation, the complainant herein, and one of the leading stockholders in said bank, as well as the attorney and the attorney-in-fact for said corporation; that said Monserrat was largely, if not wholly, responsible for said loan to said Landron; that with the first mortgage against said property for the sum of four thousand six hundred ($4,600) besides accumulated interest, and the additional charge of the second mortgage owned by the defendant with the cost of foreclosure, the third mortgage, if mortgage there was, for seventeen hundred dollars ($1,700) was a loss to said bank, or to whoever had advanced said money or held said debt, if debt there was.

V. The defendant therefore charges that said change from the agreement actually made to the conditions stated in said deed was either a deliberate and fraudulent effort to unload said debt of seventeen hundred dollars ($1,700) upon this defendant, thus causing him to lose the same instead of said bank, or whoever owns said indebtedness, if indebtedness there actually is on account of said alleged seventeen hundred dollars ($1,700) mortgage.

VI. Or, in the alternative, the defendant charges that in the eagerness of said Monserrat, as the representative and part owner of said Banco Popular, to save said sum to said bank, or to whoever was the owner thereof, he misunderstood said agreement made with his participation and wrote into said bill of sale a stipulation binding this defendant to an obligation never entertained, made or considered by defendant.

VII. Defendant further submits that the negligence of defendant in failing to study said deed was under the circumstances excusable, under the rules and practice of equity, and that whether said proviso in said deed which requires defendant to assume and pay the said sum of seventeen hundred dollars ($1,700) was inserted therein with the intention of defrauding defendant or whether said proviso was inserted in said bill of sale by mistake as above set forth, defendant respectfully submits, call for the cancellation of said instrument.

VIII. And your orator further submits that at the time said Monserrat prepared said settlement, and that at the time he made said proposition, and at the time he prepared and acknowledged said deed the said Monserrat was president and one of the principal stockholders of the Banco Popular and its legal representative.

IX. And your orator further submits as a fact constituting a violation of law well known to the said Monserrat and to the said

Landron that at the time said Monserrat acknowledged said bill of sale or deed, as a Notary Public, the said Monserrat was the president of the said Banco Popular and a heavy stockholder therein and its legal representative, and that the witnesses to the execution of said instrument were in his employ, all of which your orator submits is in violation of the law of Porto Rico, and your orator submits whether or not said acknowledgment does not, under said law, make said instrument null and void.

Wherefore, the defendant prays that said bill be dismissed and that the complainant takes nothing thereby.

2. That the said bill of sale from said Rafael Lopez Landron and wife to the defendant, Elias B. Wilcox, be held for cancellation and be declared to be null and void.

26 3. That the defendant be dismissed hence and that the complainant be adjudged to pay the costs herein.

WILLIS SWEET,
Solicitor for Defendant,
By E. B. W.

UNITED STATES OF AMERICA,
District of Porto Rico,
In the United States Court, ss:

Elias B. Wilcox, being first duly sworn, says: I am the defendant named in the foregoing answer; I have read the said answer and know the contents thereof, and the same is true of my knowledge, except as to the matters and things therein set forth upon information and belief, and as to those matters and things I believe it to be true.

E. B. WILCOX.

Subscribed and sworn to before me, in San Juan, P. R., this fifth day of July, 1916.

ANTONIO AGUAYO,
Clerk District Court U. S. for Porto Rico.
[SEAL.] By L. A. GROSS, *Deputy Clerk.*

EXHIBIT A FOR DEFENDANT.

[Filed September 6, 1912.]

In the United States District Court for Porto Rico.

No. 912. In Equity. San Juan, P. R.

WILLIS SWEET and E. B. WILCOX, Complainants,

v.

RAFAEL LOPEZ LANDRON and His Wife, ANA MARIA GUTIERREZ, Defendants.

To the Honorable Paul Charlton, Judge of the United States District Court for Porto Rico:

Now at this time come the above named complainants and say that they are citizens of the United States of America residing in Porto Rico and the defendants are citizens of Porto Rico residing in San Juan, P. R., whereupon your orators say:

27 1. That on the 12th of June, A. D. 1912, in San Juan, P. R., the defendant Rafael Lopez Landron made twelve promisory notes for the sum of Eleven Hundred and Sixty-three Dollars and thirty-five cents ($1163.35) in favor of Willis Sweet and E. B. Wilcox to secure the payment of a judgment obtained in this court against said defendant for said amount. Eleven of said notes were for the sum of One Hundred Dollars each, the first payable on the 12th of August, 1912, and the others became due as follows: September 12th, October 12, November 12th, December 12th, all in the year A. D. 1912, and on January 12th, February 12th, March 12th, April 12th and May 12th, all in the year of 1913, and one of said notes, for the sum of $63.35, became due on June 12th of the year 1913.

2. The said defendant to secure the payment of the above-mentioned notes, together with his wife, Ana Maria Gutierrez, did execute a certain mortgage bearing the date of the 12th day of June, A. D. 1912, made before notary public Hugh R. Francis, the same being number six (6) of the protocol of said notary. Said mortgage was conditioned for the payment of the sum of Eleven Hundred and Sixty-Three Dollars and thirty-five cents ($1163.35) and at the times and in the manner specified in said notes, with the further condition that in the event of the failure on the part of defendant to pay any one of said notes when same became due, that if same was not paid thirty days thereafter, that the failure to so pay said note within 30 days after same became due, would have the effect of maturing the whole obligation and that the remaining amount of balance unpaid should immediately become due and payable. Your orators further say that said mortgage was duly recorded in the office of the registrar of property in San Juan, P. R., and in the first section of said registry

on the 10th day of July, A. D. 1912, in book 24 of mortgages "Santurce Norte," finca No. 2,115, inscription 11th, and on page 70 (over) of said book twenty-four, a copy of which said mortgage with endorsements thereon is hereby annexed marked "Exhibit A" and made a part of this complaint.

3. That with the consent of said defendant said notes were given by complainants to the Royal Bank of Canada doing business in
28 this city for collection as said notes fell due. Complainants are informed and believe and therefore state it to be a fact upon information and belief that the said bank called many times upon defendant to collect the amount due named in the first of the series of notes above named, after same became due and many times after August 12th, 1912, for the purpose of collecting the first of said notes, but that defendant failed to pay the same or any part thereof and said Bank has been unable to collect any part of the said first note or any or any part of any other of said notes and that the first of said notes is long over due and payable.

Wherefore complainants pray judgment against the said defendant,—

1. For the sum of One Thousand One Hundred and Sixty-Three Dollars ($1163.35) with interest at the legal rate and the costs of this action with cost and attorneys fees as stipulated and agreed by the terms of said mortgage.

2. That the usual decree be made for the sale of the premises described in the mortgage attached by the Marshal of this Court; that the proceeds of said sale be applied in the payment of the amount due complainants, and that said defendant, and all persons claiming under him, subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all rights, claim, or equity of redemption in said premises, and every part thereof, and that the said plaintiff may have judgment, and execution against said defendant for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

3. That the plaintiff or any party to this action may become a purchaser at said sale; that the Marshal execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on the production of the Marshal's deed therefor; and that the plaintiffs may have such other and further relief in the premises as to this court may seem meet and equitable.

Forasmuch as your orators can have no adequate relief, except in this court, and to the end therefore, that the defendants may,
29 if they can, show why your orators should not have the relief hereby prayed and may make a full disclosure and discovery of all the matters aforesaid and according to the best and utmost of their knowledge, remembrance and information and belief full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

May it please your Honor to grant unto your orators a writ of sub-

pœna of the United States of America directed to the said Rafael Lopez Landron and his wife, Ana Maria Gutierrez, commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

E. B. WILCOX,
WILLIS SWEET,
Solicitors.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

On this the 6th day of September, A. D. 1912, personally appeared before me E. B. Wilcox who being duly sworn deposes and says: That he is one of the complainants in the above-named action and that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true *as* his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

E. B. WILCOX,
One of the Complainants.

Subscribed and sworn to before me on this 6th day of September, A. D. 1912.

[SEAL.] RAFAEL GUILLERMETY, *Clerk.*

30 EXHIBIT B FOR DEFENDANT.

[Filed December 4, 1912.]

In the United States District Court for Porto Rico.

Equity. No. —. San Juan, P. R.

WILLIS SWEET and E. B. WILCOX, Complainants,

v.

RAFAEL LOPEZ LANDRON and His Wife, ANA MARIA GUTIERREZ, Defendants.

Final Decree.

This cause coming on this day for final hearing upon application of counsel for the complainants for a decree herein according to the prayer of the bill of complaint, and same having been heard upon complaint filed herein and upon an answer filed thereto, counsel for defendant having been notified but not appearing, and the court having heard the proofs necessary to enable it to render judgment herein; and it appearing to the court that there is now due to the plaintiffs from the defendants, Rafael Lopez Landron and his wife Ana Maria

Gutierrez, the sum of One Thousand, One Hundred and Sixty-Five Dollars and thirty-five cents since October 12th, A. D. 1912, together with the additional sum of Three Hundred Dollars for costs as provided by the terms of the mortgage herein, therefore

It is adjudged and decreed that all and singular the mortgaged premises mentioned in the said complaint and herein after described or so much thereof as may be sufficient to raise the amount due to the plaintiffs of One Thousand Four Hundred and Sixty Five Dollars and thirty five cents ($1,465.35) as principal and costs in this suit and expenses of sale and which may be sold separately without material injury to the parties interested, be sold at public auction ten days from the date of this decree unless the defendants pay to the plaintiffs the above amount named of One Thousand Four Hundred and Sixty Five Dollars and thirty five cents ($1,465.35) together with the sum of Three Hundred Dollars in addition thereto.

2. It is further ordered, adjudged and decreed that Harry Hubbard be, and he is hereby appointed Special Master in Chan-
31 cery of this Court to execute this decree by making said sale, and that he is instructed to and it is so decreed that he shall pay to the said plaintiffs the amounts above named, including the costs and the expenses of this suit and the sale of the said mortgaged property and that from the proceeds of the sale he shall pay plaintiffs as stated and the said Special Master shall retain all his fees, commissions and costs from the said proceeds.

3. It is further adjudged, ordered and decreed that the said Harry Hubbard, as Special Master in Chancery, shall give public notice of the time and place of such sale by previously publishing the same once each week for four successive weeks in a newspaper regularly published and having a general circulation in this District that said sale shall be made at the Court house door of this Court in the city of San Juan aforesaid; and that said special master do make a report to this court of his doings in the premises with all convenient speed in case said indebtedness is sooner satisfied and such sale rendered unnecessary, and that the said Special Master shall do all other things and all else according to the course and practice of the court and the law relative to sales of real estate under execution; and it is further ordered decreed and adjudged that the plaintiffs or either of them may become the purchaser at the sale of the mortgaged premises; and that the said Special Master in Chancery shall be and is hereby authorized to make the deed of transfer of the said property in favor of the purchaser at the said public sale; and that upon the said sale being made and confirmed the said defendants, Rafael Lopez Landron and his wife Ana Maria Gutierrez and all persons claiming by, through, or under them, since the commencement of this suit are forever barred and foreclosed of all right and equity of redemption in or to said mortgaged premises, or any part thereof; and that in case the proceeds arising from said sale shall be insufficient to pay the amount so due the complainants as aforesaid, after deducting the costs of making this sale which are to be first paid the said Special Master shall in his report specify the amount of such deficiency and upon the confirmation of such sale, the complainants may upon ap-

plication have such further decree in the premises as may be equitable.

32 4. And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at said sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person since the commencement of this action has come into possession under them, or either of them, deliver possession thereof to such purchasers, or purchaser, on the production of the Special Master's deed for such premises or any part thereof.

The description and particular boundaries of the property mortgaged ordered to be sold in satisfaction of the terms of this decree are as follows: "House with lot on Park or Electric Car Street Northern Section of the ward of Santurce, of this city, it being a two story house of wood and zinc roof, measuring 15 meters in front by 22 meters deep; the lot being on the East front to said street 41 meters on the right hand side entering, North, is bounded by another lot of Don Rafael Lopez Landron, now Pedro Gandia, 51 meters 50 centimeters; on the left, South, is also bounded by another lot of Mr. Landron, separated by a paved street, 51 meters, 50 centimeters and on the back, West, is bounded by lands of Rafael Lopez Landron, now Pedro Gandia, 42 meters fifty centimeters."

Done and ordered in open Court on this the 4th day of December, A. D. 1912.

[SEAL.] PAUL CHARLTON, *Judge.*

EXHIBIT D [C] FOR DEFENDANT.

[Filed August 27, 1913.]

Special Master's Return.

I hereby certify and return that the execution of this decree was postponed from time to time by order of plaintiffs herein and that finally a settlement was had between parties hereto.

Therefore by order of plaintiffs I return this decree unexecuted.

This at San Juan, P. R., Aug. 27, 1913.

H. S. HUBBARD,
Special Master in Chancery.

33 *Notice of Master's Sale.*

In the District Court of the United States for Porto Rico.

WILLIS SWEET & E. B. WILCOX, Complainants,

v.

RAFAEL LOPEZ LANDRON and His Wife ANA MARIA GUTIERREZ, Defendants.

Foreclosure of Mortgage.

Notice is hereby given that in pursuance and by virtue of a final decree in the above entitled cause of the above court dated on the 4th day of December, A. D. 1912, the undersigned as Special Master in Chancery named in said decree, will sell at public sale, for cash, to the highest and best bidder, at the door of the Court House of the United States District Court for the District of Porto Rico, at San Juan, Porto Rico, on the 5th day of February, A. D. 1913, at the hour of two o'clock in the afternoon of that day, the property hereinafter more particularly described and all right title, interest and equity of redemption of the said Rafael Lopez Landron and his wife Ana Maria Gutierrez, in and to the said property described as follows to wit: "House with lot on Park or Electric Car Street Northern Section of the ward of Santurce, of this City, it being a two story house of wood and zinc roof, measuring 15 meters in front by 22 meters deep; the lot being on the East front to said street 41 meters on the right hand side entering, North, is bounded by another lot of Don Rafael Lopez Landron now Pedro Gandia, 51 meters 50 centimeters; on the left, South, is also bounded by another lot of Mr. Landron, separated by a paved street 51 meters, 50 centimeters and on the back, West, is bounded by lands of Rafael Lopez Landron now Pedro Gandia, 42 meters fifty centimeters."

The terms and conditions of this sale are as follows: said sale to be conducted and made according to the rules and practice and subject to confirmation by said United States District Court and to satisfy the amounts due as in said decree provided for principal and interest and the several other sums therein allowed to be paid or so much thereof as said property will bring upon said sale.

34 Dated at San Juan, P. R. this 7th. day of January, 1913.

H. S. HUBBARD,
Special Master in Chancery.

(In pencil.)

Do not publish today wait for further orders.

H. S. HUBBARD, *Master.*

Not published case settled.

Exhibit D for Defendant.

[Filed January 9, 1913.]

Number Six.

Voluntary Mortgage to Secure Promissory Notes.

(Written Obligations.)

In the city of San Juan, Porto Rico, on the 12th of June 1912 before me Hugh R. Francis, lawyer and notary of the territory of the Island of Porto Rico, with residence, vicinity and open office in this City. Appear

1. Don Rafael Lopez Landron, resident of San Juan, lawyer, forty nine years of age, married to Dona Ana Maria Gutierrez.

2. Willis Sweet, of the same vicinity, lawyer, 56 years of age, and married.

3. Elias B. Wilcox, of the same vicinity, lawyer, of 41 years of age, married.

They appear, the first in his own right and as general attorney in fact for his wife Dona Ana Maria Gutierrez, which power of attorney he does not exhibit because it is not at hand, he assuming that he has sufficient powers to execute this contract, binding himself to produce it whenever necessary, and the others, that is Messrs. Sweet & Wilcox, in their own right and as members of the dissolved professional partnership, Sweet & Wilcox.

The parties hereto, who are to me personally known aver that they have and I so believe, the legal capacity necessary for the execution of this document, which they assure has not been limited in any manner whatsoever, wherefore of their own free will they, set forth

35 1. That the first party hereto, Mr. Lopez Landron, and his wife Dona Maria Gutierrez, are the owners of the following property:

House with lot on Park or Electric Car street, Northern Section of the ward of Santurce, of this city, it being a two story house of wood and zinc roofed, measuring 15 meters in front by 22 meters deep; the lot being on the East front to said street 41 meters; on the right hand side, entering, North, is bounded by another lot of Don Rafael Lopez Landron, now Pedro Gandia, 51 meters 50 centimeters; on the left, South, is also bounded by another lot of Mr. Landron, separated by a paved street, 51 meters 50 centimeters and on the back, West, is bounded by lands of Rafael Lopez Landron, now Pedro Gandia, 42 meters fifty centimeters.

2nd. That said property is subject to a first mortgage for four thousand six hundred dollars in favor of "The Banco Popular de Economias y Prestamos de Puerto Rico" and a cautionary notice of attachment for Two hundred dollars at the request of E. S. Paine.

3rd. That in a trial held in the District Court of the United States for Porto Rico, in which Sweet & Wilcox were the plaintiffs and Rafael Lopez Landron the defendant, the Jury rendered a verdict

against Lopez Landron, for the sum of One Thousand one hundred and twenty nine dollars in favor of the plaintiffs, which judgment together with the costs amount now to the sum of One thousand one hundred and sixty three dollars thirty five cents.

4th. That by reason of said balance or debt arising from said judgment, Mr. Lopez Landron, has executed in favor of Messrs. Sweet & Wilcox, eleven promissory notes of one hundred dollars each, without interest, payable on the 12th of July, August, September, October, November and December 1912, January, February, March, April and May 1913, and another one for sixty three dollars and five cents payable on the 12th of June 1912, all of said notes being executed to their favor and order.

And Mr. Lopez Landron having agreed by himself and as attorney in fact of his wife Dona Ana Maria Gutierrez, to secure through a second mortgage the payment of all and each of said notes, they carry the same into under the following stipulations.

First. Don Rafael Lopez Landron, by himself and as at-
36 torney in fact for Dona Ana Maria Gutierrez, constitutes a second mortgage upon the urban property and lot described in paragraph first of this deed, in favor of Messrs. Willis Sweet and Elias B. Wilcox, for the sum of One Thousand one hundred and sixty three dollars thirty five cents, represented by the twelve promissory notes executed by Mr. Rafael Lopez Landron, in favor of Messrs. Sweet & Wilcox, the said mortgage to become due partially as the respective notes fall due it being specified that if the debtor should fail to pay any one of the notes within thirty days after the date of maturity, the remaining installments shall be considered as due, and the creditors shall have the right to foreclose this mortgage to the extent of the liability on the unpaid notes.

Second. The debtors further constitute a mortgage credit for three hundred dollars for costs in case of foreclosure.

Third. Messrs. Sweet & Wilcox accept this mortgage fully, as it is in accordance with what has been agreed, and they accept said promissory notes in full payment and settlement of said judgment rendered by the District Court of the United States for Porto Rico.

And I the Notary made to the parties the legal warnings in spite of their statement that they had knowledge of them.

They so covenanted in my presence and before the witnesses without legal disqualification to act as such, Don Juan Lozada y Gil, resident of Bayamon, married, of full age, broker, and Don Enrique Plumey, of this vicinity, widower, of full age and lawyer, who have hereunto set their hands after reading this deed each by himself, in the exercise of the right which the notarial law grants them.

Of all of which, as well as to the knowledge, profession and vicinity of the contracting parties and witnesses and to all other matters contained in this public deed, I the Notary certify.

WILLIS SWEET.
E. B. WILCOX.
RAFAEL LOPEZ LANDRON.
JUAN LOZADA.
ENRIQUE RINCON.

Marked and signed.
HUGH R. FRANCIS.

37 There is an excise stamp of one dollar.
It is a true and correct copy of the original on file in my current protocol to which I refer.

In testimony whereof, and at the request of Mr. Elias B. Wilcox I issue the present first copy which I mark and sign in the city of San Juan, Porto Rico, on the 5th of July 1912.

HUGH R. FRANCIS.

Presented at 3.5 p. m. Entry No. 120—Folio 31—Volume 39 San Juan, P. R., July 10th, 1912.—Fees 0.50.

The Registrar, BELEVAL.

The preceding document has been inscribed having before me the proper power of attorney, at folio 70 over, volume 24, of Santurce North, property number 2115, triplicate, inscription 11th, where it has been made to appear the defects subject to correction of not having expressed who are the spouses of the creditors, and of having omitted the square area of the mortgaged property.
San Juan, P. R., July 26th, 1912.

The Registrar, JOSE S. BELEVAL.

There have been cancelled one stamp of $5. and three of $1. besides one of 0.50 as provided for in the Political Code.
San Juan, P. R., July 26th, 1913.

BELEVAL.

The above is a correct translation.
F. FANO,
Interpreter & Translator U. S. Court.

EXHIBIT E FOR DEFENDANT.

[Filed July 10, 1916.]

Notarial Office of Damian Monserrat, Lawyer,

San Juan, Porto Rico.

Deed of Purchase and Sale.

Don Rafael Lopez Landron, in his own right, and in representation of his wife, Dona Ana-Marie Gutierrez e Igaravidez, and Mr. Elias B. Wilcox.

38 Executed on the 14th of January 1913, under number 16 of the Protocol.

(Rubber stamp:) Municipality ——; Ward, Santurce, North, Place, Park; Presenter, T. C. Timpson; Address, Tel. 86.
Attested Copy.

Number Sixteen.

In the city of San Juan, Capital of Porto Rico, on the 14th of January 1913. Before me, Damian Monserrat y Simo Lawyer,

Notary Public, with vicinity and residence thereat, appear for the purpose of executing a contract of purchase and sale of an urban property,

As vendor, Don Rafael Lopez Landron, of forty nine years of age, married, lawyer, a resident of this city, in his own right and in representation of Doña Ana Maria Gutierrez e Igaravidez, of thirty six years of age, property owner, and a resident of this city, who has given him her consent and authority to sell and encumber real properties belonging to the conjugal partnership, by deed executed before me on the 27th of October 1909, the original of which has been exhibited to me and will attest the same at the end of the present, preceding the signature.

As purchaser, Mr. Elias B. Wilcox, of forty years of age, lawyer, married to Madam Vardaman Cockrell, and a resident of Ton Baja.

The parties hereto, have in my judgment the legal capacity necessary for the execution of this deed, wherefore, they set forth:

Property.

First. Don Rafael Lopez Landron is the owner of a house with lot on Park street, or of the Electric Tramway, Section North in the ward of Santurce, of this city. A two-story house, built of wood and covered with zinc; it measures fifteen meters in front by twenty two meters deep. The lot measures on the Eastern front, facing the street, forty one meters on the right, entering, to the North, adjoining another lot formerly owned by Don Rafael Lopez Landron, now Don Pedro Gandia, fifty one meters and fifty centimeters; on the left, to the South, in boundary with another lot of Don Rafael Lopez Landron, fifty one meters and fifty centi-
39 meters, and in the rear to the West bounding with lands formerly belonging to Don Rafael Lopez Landron, now Don Pedro Gandia, forty two meters and fifty centimeters. It contains an area of two thousand one hundred and fifty square meters, more or less.

Title.

This property, according to material division of another one, as appears in deed of June 8th, 1908 before the Notary Don Juan Guzman Benitez, was segregated from that which Don Rafael Lopez Landron purchased from Don Guillermo Igaravidez Landron, according to deed of July 18th, 1904, authorized by the Notary Don Juan Hernandez Lopez, and recorded in the Registry of Property, Section First, page 241, volume 49, of the Capital, property number 2115 fourth inscription.

Liens.

It is subject to the following:

To a mortgage in favor of the Banco Popular de Economias y Prestamos, to secure the payment of a loan of four thousand six hundred dollars, interest thereon at one per cent monthly and an

additional credit of five hundred dollars for indemnities in case of a judicial claim. This mortgage, constituted by deed executed before me on the 29th of July 1909, is recorded in the above mentioned Registry, at folio 217, volume 58, of the Capital, property aforesaid tenth inscription.

To another mortgage which likewise guaranties to the Banco Popular de Economias y Prestamos the restitution of a loan of one thousand seven hundred dollars, together with interest at the rate of one per cent monthly and an additional credit of two hundred dollars for indemnities in case of judicial proceedings. This mortgage, constituted by deed of December 3d, 1912, before the Notary Don Damian Monserrat y Simo, has not yet been recorded in the Registry of Property.

Declaration.

Fourth. According to deed executed on the 12th of June, 1912, before the Notary Hugh R. Francis, under number six, Don Rafael Lopez Landron, constituted a mortgage upon the above described property in favor of Messrs. Willis Sweet and Elias R. Wilcox, for the sum of One thousand one hundred and sixty three dollars and thirty five cents, represented by twelve promissory notes executed by Don Rafael Lopez Landron, in favor of and to the order of Messrs. Sweet & Wilcox, and in addition thereto, three hundred dollars for costs in case of foreclosure. This mortgage, was recorded in said Registry of Property, at folio 70 over, of volume 24 of Santurce, North, property number 2115, eleventh inscription.

The parties hereto set forth, that Messrs. Sweet and Wilcox followed executory proceedings in the District Court of the United States for Porto Rico, for the collection of the twelve promissory notes aforesaid, and obtained judgment against Don Rafael Lopez Landron, for the amount of principal in the notes, interest and costs; and that Don Rafael Lopez Landron having paid to Messrs. Sweet and Wilcox, the sum of One thousand one hundred and sixty three dollars and thirty five cents, the value of said notes, interest costs and sums involved in the judgment referred to, as well as the expenses of the execution including attorney's fees, the said Willis Sweet and Elias R. Wilcox, are now obliged to cancel fully the mortgage constituted in their favor by deed of June 12th, 1912, aforesaid.

Contract.

Fifth. The parties hereto further set forth, that having entered into an agreement for the purchase and sale of the above mentioned property, they carry the same into effect, subject to the following conditions.

First. Don Rafael Lopez Landron, acting in his own behalf and as attorney in fact for his wife Dona Ana Maria Gutierrez e Igaravidez, makes sale unto Mr. Elias R. Wilcox, the purchaser herein, of the property described in clause number one of the Statement,

which sale is made in consideration of the sum of Seven thousand eight hundred and thirty two dollars and twenty five cents.

Second. From the sum of Seven thousand eight hundred and thirty two dollars and twenty five cents, which is the purchase price, there is deducted the sum of Six thousand and three hundred dollars, which make up the capitals guaranteed by the two mortgages in favor of the Banco Popular de Economias y Prestamos, de-
41 clared in clause number three of the Statement; and the purchaser binds himself to make payment of said capitals, and interest, guaranteed by said mortgages, as well as to comply with all its obligations, principal and accessory.

Third. The balance of the price, that is to say, the sum of One thousand five hundred and thirty two dollars and twenty five cents, has been received by the vendor from the purchaser, according to his own admission, and therefore he gives him the proper release. Such confession he ratified after having been warned by the Notary that it constitutes a declaration against interest according to articles 1186 and 1200 of the Civil Code.

Fourth. The vendor delivers possession of the property to the purchaser at this moment.

Fifth. The purchaser Mr. Elias B. Wilcox, as an interested party in the facts recited in clause number four of the Statement, recognizes that the same are true, and binds himself to answer to Don Rafael Lopez Landron, for any damage which he may suffer by reason of any claim arising from the mortgage constituted to guaranty the promissory notes to the order of Messrs. Sweet and Wilcox, on account of said promissory notes; for Mr. Elias B. Wilcox, the purchaser herein, takes charge of the total cancellation of said mortgage and its obligations.

Sixth. With the exception of the mortgages and liabilities declared, of which the purchaser has taken charge, any other lien, encumbrance or liability which might appear affecting the property herein sold, shall be for the account and charge of the vendor.

Seventh. Don Elias B. Wilcox accepts this deed and the property thereby acquired.

The reservations and legal warnings pertinent to this contract have been made; and the parties advised accordingly.

They do state, in the presence of the witnesses residents of this city, Don Inocente Rivera and Don Francisco Soriano.

Copy.

Number 663.—In the city of San Juan, Capital of Porto Rico, on the 27th of October 1909, Before me, Damian Monserrat
42 y Simo, lawyer, notary public, with vicinity and residence in this city, and office at number 17 on Cruz street, appears Dona Ana Maria Gutierrez e Igaravidez of 33 years of age, married, property owner, and a resident of San Juan, for the purpose of giving her consent and executing this power of attorney. She has in my judgment the legal capacity necessary for executing this deed, and of her own free will sets forth: That she grants, gives and confers

her most ample consent and power of attorney to her husband Don Rafael Lopez Landron, of forty five years of age, lawyer, resident of this city, for him to sell, assign, exchange, give in payment, leave, mortgage or in any other manner sell and incumber the properties belonging to the existing conjugal partnership, acquired prior to this date, or those which it may hereafter acquire, whether the same shall consist of urban or rustic properties, rights or interests therein, mortgage credits, or whether consisting of other class or real properties or real rights, for such prices or values and under such conditions, and under such agreements, suspensive, resolutory and others, as he may deem fit; to cancel in whole or in part, mortgages or other rights constituted or which may hereafter be constituted in favor of the same conjugal partnership, in the name of one or the other spouse, or both; to ratify the sales of real properties heretofore made, or mortgages constituted prior to this date, and sign the deeds wherein the ratification or confirmation of said contracts be made, thus lending the consent prescribed in such cases by article 159 of the new Civil Code; to confer to third persons for the act pointed out such powers as he may deem necessary, and to execute such documents and public deeds as may be proper, including those of purchase and sale, with or without mortgage, furnishing bonds without the appearance of the principal, for this consent and power of attorney includes all acts hereinabove specified without any limitation, and all proper exemptions. She so states and executes in my presence and before the witnesses herein Don Francisco Soriano and Don Pedro Jose Rodriguez, residents of this city. Having read the present deed to the lady hereto, and to the witnesses, all having been informed that they were entitled to read it by themselves,
43 it was read by the former and not by the latter; the one and the others having stated that they are well aware of its contents, which the principal ratified.

In testimony whereof she signs together with said witnesses; of which, and as to the identity of the party hereto, and her personal circumstances as well as all other matters herein affirmed or recited, I, the Notary certify.

ANA MA. GUTIERREZ LOPEZ.
FRANCO SORIANO.
PEDRO JOSE RODRIGUEZ.
DAMIAN MONSERRAT.

The foregoing insertion is a true and correct copy of the original thereof to which I refer.

Reading and Signatures.

The contracting parties, after having read the present deed lend their consent thereto; I read it to the witnesses, who did not exercise that right, of which I informed them whereupon they all sign before me, the notary, who certifies that the parties hereto are

known to him, as well as to all other facts affirmed or set forth in this public instrument.

RAFAEL LOPEZ LANDRON.
ELIAS B. WILCOX.
INOCENTE RIVERA.
FRANCO SORIANO.
DAMIAN MONSERRAT.

There is an internal revenue stamp of one dollar, cancelled by the stamp of the Notary.

This is a first copy for the purchaser Don Elias B. Wilcox, of deed number 16, filed in the general protocol of my notarial office, for the corresponding year, and I issue the present on two sheets of paper of my use.

I certify that the foregoing is a true and correct copy of the original thereof, which I issue in the city of San Juan, Porto Rico, on the same day, month and year of its execution.

DAMIAN MONSERRAT,
Lawyer and Notary.

44 Presented at 3.50 p. m. Entry No. 56—Folio 13—Volume 40. San Juan, P. R., January 29th, 1913. Fees $0.50.

The foregoing document which is deed No. 16 dated January 14th ultimo, executed before the Notary Don Damian Monserrat Simo, has been recorded at folio 73, volume 24, of Santurce, North, property number 2115, triplicate, inscription 13th, the lots consisting of two thousand and ninety four square meters forty five centimeters, the remaining portion according to the Registery.

San Juan, Porto Rico, Feb. 5th, 1913.

THE REGISTRAR.

Cancelled ten stamps of $1. No. 5 of the tariff Rule 1, and one stamp of 50 cents of tax provided for by the Political Code.

San Juan, P. R. Feb. 5, 1913.

BELAVEL.

A correct translation.
F. FANO.

Decree of Foreclosure.

August 25, 1916.

This cause came on to be heard at this term of court, upon the bill, the answer of the respondent, Elias B. Wilcox, as last amended and the proofs in the case, and was argued by counsel. From the consideration of all of which the court orders and decrees:

That the respondent, Elias B. Wilcox, by virtue of a deed executed before Notary Public Damian Monserrat y Simo under date of

January 14, 1913, purchased the hereinafter described property and assumed and became liable for two mortgages on said property, described in the bill of complaint as follows:

"1. Mortgage executed before Notary Public Damian Monserrat y Simo by Rafael Lopez Landron and his wife Mrs. Ana Maria Gutierrez Igaravidez in favor of the complainant on the twenty-ninth day of July, 1909, for the term of one year for the sum of $4,600 and interest at 1 per cent per month thereon.

"2. Mortgage executed before Notary Public Damian Monserrat y Simo by Rafael Lopez Landron and his wife Mrs. Ana Maria Gutierrez Igaravidez in favor of the complainant on the third
45 day of December, 1912, for the term of one year for the sum of $1,700 and interest thereon at 1 per cent per month."

Said property being described as follows:—

"A house and lot situated on Park Street (Calle del Parque o tren Electrico) in the Northern Section of the barrio of Santurce, this City.

"The house is made of wood, consists of two stories and is roofed with zinc measuring 15 meters in length by 32 in width (fondo) and the lot measures on the East 41 meters in length; on the North, and enjoining another plot of land belonging to Mr. Rafael Lopez Landron, it measures 51 meters and 50 meters; on the South also adjoining once more lands of the said Rafael Lopez Landron, formerly Belen Requena, 42 meters and 50 centimeters."

It is further ordered, adjudged and decreed that default has been made in the payment of principal and interest upon said mortgages entitling the complainant to foreclosure and sale of the mortgaged property. That there is now due and owing on said mortgages as follows:—

Principal on first mortgage herein mentioned	$4,600.00
Interest on above sum from August 3, 1913, to August 25, 1916	1,694.33
Additional sum stipulated for attorney's fees and expenses	500.00
Principal on second mortgage herein mentioned	1,700.00
Interest on above sum from August 3, 1913, to August 25, 1916	626.08
Additional sum stipulated for attorney's fees and expenses	200.00
Insurance upon property	311.51
Total	$9,631.92

It is further ordered and decreed that respondent pay the complainant within ninety days from this date the sum herein found to be due for principal, interest, etc., to wit, $9,631.92, and in default of the payment thereof within said time that said mortgaged property be sold and all rights of equity of redemption of the respondent shall be forever barred and foreclosed.

46 Antonio Aguayo, the clerk of this court, is hereby, by consent of the parties, appointed Special Master herein.

The sale shall be made by said master at public auction to the highest bidder at the Court Room in the City of San Juan, Porto Rico, on a day named by him in his notice of sale; that before making said sale notice thereof shall be published once a week for at least four weeks prior to said sale in a newspaper issued and having a general circulation in Porto Rico.

It is further ordered and decreed that the funds to arise from said sale shall be applied as follows:—

1. To the payment of all proper expenses attendant upon said sale, including the expenses, outlays and compensation of the Special Master to make said sale, as such expenses, outlays and compensations may be hereinafter fixed and allowed.

2. To the payment of the costs of this case and expenses.

3. To pay the mortgage indebtedness.

Done at San Juan this twenty-fifth day of August, A. D. 1916.

PETER J. HAMILTON, *Judge.*

Bill of Review.

[Filed December 23, 1916.]

To the Honorable Peter J. Hamilton, Judge of the District Court of the United States for Porto Rico:

Your petitioner, the defendant in the above-entitled suit, hereinafter to be known as the plaintiff, appearing against the El Banco Popular de Economias y Prestamos de San Juan, P. R., hereafter to be known as the defendant in this bill, would show unto your Honor that on the ninth day of the month of June, 1914, the said defendant herein, the Banco Popular, exhibited its bill of complaint in this court against your petitioner and therein it alleged that by virtue of a deed dated the 29th of July, 1909, executed in the city of San Juan, before Notary Public Damian Monserrat y Simo, Rafael Lopez Landron and his wife Ana Maria "did make and execute a mortgage in favor of your orator," the said bank, for the sum of $4,600

47 as principal, interest at 1 per cent per month and for the term of one year, the said Landron agreeing to pay an additional sum of $500 to pay the costs and attorney's fees in case of a foreclosure suit, and also agreed to keep the property insured. That the said Lopez Landon and his wife made another mortgage under the date of December 3, 1912, for the sum of $1,700, for a period of one year with interest at 1 per cent, and fixed in the said mortgage the sum of $300 to pay costs and attorney's fees and expenses in case of a foreclosure suit. That none of the principal of either mortgage has been paid, and that interest is due and unpaid on both the obligations since August 3, 1913. That the property charged with the above liens is described as follows: "A house and lot situated on Park Street (Calle del Parque o tren Electrico), in the northern section of the barrio of Santurce, this city (San Juan, P. R.). The

house is made of wood, consists of two stories and is roofed with zinc measuring 15 meters in length by 32 in width (fondo) and the lot measures on the East 41 meters in length; on the north, and adjoining another plot of land belonging to Mr. Rafael Lopez Landron, it measures 51 meters and fifty meters; on the south also adjoining land of Mr. Rafael Lopez Landron, it measures 51 meters and 50 centimeters, and on the West adjoining once more lands of the said Rafael Lopez Landron formerly Belen Riquena, 42 meters and 50 centimeters." That by another deed executed before Notary Public Damian Monserrat, under the date of January 14, 1913, Rafael Lopez Landron and his wife Ana Maria Gutierrez, the original mortgagors, sold the above described property to Elias B. Wilcox, who assumed the said debts and acknowledged and confessed in the said deed his obligation to pay the mortgage liens upon the said property. That the two mortgages and the deed of sale were duly recorded, the first mentioned mortgage made on July 29, 1909, for $4,600, on August 3, 1909, the second mortgage mentioned for $1,700 being recorded January 28, 1913, and the deed of sale on January 29, 1913. It was further alleged in the complaint that the amount due the said bank was in all $7,549.68.

2. Your petitioner appeared and under oath answered said bill in his amended answer and denied his liability as to the last
48 named mortgage for the reason that same was not recorded on the date of the making of the said deed of sale, that is to say, on January 14, 1913, and that petitioner agreed to assume the payment of any mortgage indebtedness against the said property which might be recorded on any date prior to that of the said transfer on January 14, 1913, and that the said mortgage for $1,700 was not recorded on that date nor prior thereto and was only recorded on January 28, 1913, and that your petitioner had no knowledge of the existence of the mortgage for $1,700 nor of any other mortgage held by the said bank, except the one for $4,600. And that the deed wherein it appeared that E. B. Wilcox assumed the obligation to pay the two mortgages did not correctly state the agreement entered into between the said Wilcox and Lopez Landron and his wife; that the deed so drawn was drawn for the purpose of defrauding the said Wilcox; that said deed was a long instrument, written in the Spanish language; that same was not all read by your petitioner, who did not understand the Spanish language very well, but who relied upon the statement of the notary Damian Monserrat that the instrument was drawn by him in accordance with the agreement which had been entered into between the said Wilcox and Lopez Landron, and at the time at which said agreement was entered into the said Monserrat was present and assisted in the discussion of the terms of the agreement and knew same perfectly well. Your petitioner further answered that the deed of sale was void under the law because it was prepared and made before the said Monserrat, acting as a notary and who was an interested party in the transaction, for the reason that he was at the time the attorney-in-law for the said bank, its president and a large stockholder therein, and that the said deed of sale was void also for the reason that among the witnesses who

acted as such at the signing of the said deed of sale were persons who were servants and employees of the said Notary Monserrat. A full copy of the amended answer is hereto attached and made a part of this bill, and marked "Exhibit A." Your petitioner would also show that issue was joined and proof taken and the cause being duly heard when a decree was rendered as follows:—

49 "This cause came on to be heard at this term of the court upon the bill, the answer of the respondent, Elias B. Wilcox, as last amended and the proofs in the case, and was argued by counsel. From the consideration of all of which the court orders and decrees:—

"That the respondent Elias B. Wilcox by virtue of a deed executed before Notary Public Damian Monserrat y Simo under date of January 14, 1913, purchased the hereinafter described property and assumed and became liable for the two mortgages on said property, described in the bill of complaint as follows: 1. Mortgage executed before Notary Public Damian Monserrat y Simo by Rafael Lopez Landron and his wife Mrs. Ana Maria Gutierrez Igaravidez in favor of the complainant on the twenty-ninth day of July, 1909, for the term of one year, for the sum of $4,600 and interest at 1 per cent per month thereon.

"2. Mortgage executed before Notary Public Damian Monserrat y Simo by Rafael Lopez Landron and his wife Mrs. Ana Maria Gutierrez Igaravidez in favor of the complainant on the third day of December, 1912, for the term of one year, for the sum of $1,700 and interest thereon at 1 per cent per month.

"Said property being described as follows:—

" 'A house and lot situated on Park Street (Calle del Parque o tren Electrico) in the Northern Section of the barrio of Santurce, this city. The house is made of wood, consists of two stories and is roofed with zinc, measuring 15 meters in length by 32 in width (fondo) and the lot measures on the East, 41 meters in length; on the North, and adjoining another plot of land belonging to Mr. Rafael Lopez Landron it measures 51 meters and 50 -meters; on the south adjoining land of Mr. Rafael Lopez Landron, it measures 51 meters and 50 centimeters, and on the West adjoining once more lands of the said Rafael Lopez Landron, formerly Belen Requena 42 meters and 50 centimeters.'

"It is further ordered, adjudged and decreed that default has been made in the payment of the principal and interest upon said mortgages entitling the complainant to foreclosure and sale of the mortgaged property:

Principal on first mortage herein mentioned.....	$4,600.00
Interest on above sum from August 3, 1913, to August 25, 1916.....	1,694.33

50

Additional sum stipulated for attorney's fees and expenses.....	500.00
Principal on second mortgage herein mentioned.....	1,700.00
Interest on sum above from August 3, 1913, to August 25, 1916.....	625.08
Additional sum stipulated for attorney's fees and expenses.....	200.00
Insuranece on property.....	311.51
Total.....	$9,631.92

It is further ordered and decreed that respondent pay the complainant within 90 days from this date the sum herein found to be due for principal, interest, etc., to wit, $9,631.92, and in default of the payment thereof within said time that said mortgaged property be sold and all rights of equity of redemption of the respondent shall forever be barred and foreclosed.

"Antonio Aguayo, the clerk of this court, is hereby, by consent of the parties, appointed Special Master herein.

"The sale shall be made by the said master, at public auction to the highest bidder at the court room in the city of San Juan, P. R., on a day named by him in his notice of sale; that before making said sale notice thereon shall be published, once a week for at least four weeks prior to said sale, in a newspaper printed regularly issued and having a general circulation in Porto Rico.

"It is further ordered and decreed that the funds to arise from said sale shall be applied as follows:—

"1. To the payment of all proper expenses attendant upon said sale, including the expenses, outlays and compensation of the Special Master to make said sale, as such expenses, outlays and compensation may be hereinafter fixed and allowed.

"2. To the payment of the costs of this case and expenses.

"3. To pay the mortgage indebtedness.

"Done at San Juan, this twenty-fifth day of August, A. D. 1916.

"PETER J. HAMILTON, *Judge.*"

3. Your petitioner would further show unto your Honor that he has not paid the amount of the judgment rendered against him by the decree aforesaid, and that he is not able to do so under the terms of the decree and the conditions of the sale.

4. Your petitioner further shows that as the defendant in
51 the foreclosure suit entitled El Banco Popular etc. v. Elias B. Wilcox, Equity No. 946, he duly filed his answer to the bill filed therein, and in addition thereto filed a cross-bill against the plaintiff bank making Rafael Lopez Landron and his wife Ana

Maria parties defendant, in which cross-complaint it was sought to have set aside the deed under which your petitioner took over the property described in the bill of complaint and which is described in paragraph 2 of this bill. That a motion was sustained to dismiss the said cross-bill, the court holding that it was not a proper pleading and that the relief sought therein against the said Lopez Landron and wife, the setting aside of the said deed of sale, might properly be sought in a separate action against the said Landron and his wife; that your petitioner filed his answer against the said bank in conformity to the opinion mentioned and the action of the court without including the said Landron and wife as parties and the said foreclosure suit continued without them. That as soon thereafter as possible your petitioner prepared and filed a separate suit against the said Lopez Landron and wife, including the Banco Popular as a party defendant, which suit was number 975 Equity in this court, in which it was sought to have the said deed of sale set aside, and in which it was prayed that the said deed of sale of January 14, 1913, by which your petitioner took over the said property be declared to be null and void, and that the proceeding in the foreclosure case, equity number 946, El Banco Popular etc. v. E. B. Wilcox, be stopped until the final adjudication of the rights of the parties in the last filed suit. That while the cause Elias B. Wilcox v. Lopez Landron et al., No. 975 Equity, was pending the mortgage foreclosure suit, Equity No. 946, was heard and judgment rendered against your petitioner as set out in the court's decree as same appears in paragraph 2 of this bill.

5. Your petitioner says that after the court dismissed his cross-bill above mentioned against the bank and Lopez Landron and his wife which he had filed in the mortgage foreclosure suit, that with all possible speed and diligence he filed his separate action against the said bank and Lopez Landron and wife, and did all in his power to speed the cause so that the court might pass upon the validity
52 of the deed of sale upon which he was being sued by the Banco Popular in the foreclosure suit, but says that the progress of his suit, number 975 Equity, was hindered and retarded by dilatory tactics of the opposing attorneys in the two said cases and because of this and the fact that the foreclosure suit was speeded; the result was that the foreclosure suit was heard before the suit No. 975, alleging the invalidity of the instrument upon which the foreclosure suit was brought, could be heard.

6. Your petitioner would further show unto your Honor that the defendants, Lopez Landron and his wife, having been duly served, and not having further pleaded, nor answered your petitioner's bill filed in the said cause number 946 Equity, within the time as extended by the court and the rules thereof, an order pro confesso was entered as to the said Lopez Landron and his wife Ana Maria, and more than thirty days having elapsed thereafter your petitioner filed a motion for judgment upon the said order, which said motion was placed upon the motion call of the court for setting, was set for hearing in open court, and was heard on the day for which said motion

had been set, counsel for the said bank being present, and same was in open court granted as prayed and an order entered rendering judgment for your orator as prayed in the motion and in the prayer of the bill of the said cause No. 975 Equity, and that thereafter, on the twentieth day of December, 1916, a decree was signed by the court and entered to conform to the said order by the terms of which the said deed of sale dated January 14, 1913, by which the said Lopez Landron and his wife conveyed to your petitioner the said property described in paragraph 2 of this bill of review, and by which your petitioner assumed the two said mortgages to the bank, was declared to be null and void, as prayed, and thereafter your petitioner, having dismissed his bill as to the said bank, the said cause came on for final hearing before this court on the second day of January, 1917, and a final decree, ratifying and confirming the decree pro confesso against the said defendants herein, Rafael Lopez Landron and his wife, was duly entered on the 4th of January, 1917.

7. And your petitioner further says that the order pro con-
53 fesso in your petitioner's action to cancel the said deed could not have been made, and was not made, and that the judgement rendered thereon nor the final decree therein entered were not and could not have been rendered until after August 25, 1916, the date of the final decree in the foreclosure suit against your petitioner, number 946 Equity, for the reasons set out herein, and that the matter upon which this bill of review is, in part, based has arisen since the date of the rendition of the final decree in the said cause entitled El Banco Popular etc. v. Elias B. Wilcox, Equity No. 946.

8. And your petitioner further represents that after the entry of the order pro confesso against the defendants Rafael Lopez Landron and his wife, in the action brought by your petitioner against them to set aside the deed of conveyance, and before the entry of the decree pro confesso against the said defendants, the Special Master appointed by this court to sell the said property under its decree of foreclosure, in favor of the said bank and against this petitioner, proceeded to advertise the said property for sale under the said decree of foreclosure, and the sale thereof is set for the sixth day of January, 1917.

8a. And now that, by the decrees of this court entered in the action brought by your petitioner against Rafael Lopez Landron and his wife, the deed of sale whereby the said property was conveyed to your petitioner, and whereby your petitioner assumed the payment, according to its terms, of the two mortgages in favor of the said bank, and upon which said deed the foreclosure action of the said bank against your petitioner and the decree of foreclosure therein was based, has been declared null and void, your petitioner has been restored to the position and rights held by him prior to the execution of the said deed of sale, and the right of action of the said bank against your petitioner upon which its said decree of foreclosure was based no longer exists.

9. And now that the said deed of transfer upon which the mortgage foreclosure suit against your petitioner (946 Equity) was based

has, since the date of the decree rendered therein, been, in a separate suit, No. 975 Equity, decreed by this court to be null and void, your petitioner says that after the rendition of the decree pro con-
54 fesso declaring void, the Special Master appointed by the court in equity number 946, the foreclosure action, has ordered the publication of notices of the sale of the said property described in the said deed of transfer, and described in paragraph 2 of this bill, and the said sale has been set for January 6, 1917.

9*a*. And as a separate and further ground for this bill of review your petitioner alleges that your Honor erred, as appears from the face of the record, as follows, to wit:

That after denying on July 28, 1915, the motions of the Banco Popular, etc., dated July 28 and 29, 1914, respectively, to strike your orator's answer and cross-bill filed in said cause, your Honor entertained the same motions in forms of motions to dismiss and granted said motions. These said motions, on file, are made a part of this bill. That on July 20, 1914, your orator filed his said cross-bill and answer, and that as above stated the plaintiff bank filed their motions to strike same, which motions your Honor denied on July 28, 1915, and that thereafter, on October 25, 1915, the said bank not having pleaded thereto or secured from the court an extension of the time within which to plead or answer, your petitioner filed a motion for a decree pro confesso on his answer and cross-bill, which said motion was some time later submitted on briefs, and which motion was denied by your Honor in the mistaken belief that the motion for a judgment pro confesso had been waived, when as a matter of fact same had been insisted upon by argument in your orator's brief filed in support of the said motion, and your orator makes the said motion, your orator's brief in support thereof and your Honor's opinion denying the same parts of this bill.

10. Your orator respectfully says that your Honor erred in the course of the hearing of the said cause in that, when your orator attempted to prove that the notarial deed of January 14, 1913, under which your orator took over the property in question from the owners, Rafael Lopez Landron and his wife, did not contain the agreement and contract made and entered into between your orator and the said owners, and that the said deed was mistaken in its statement of the said contract, your orator offered in evidence in support of
55 what he alleged was the true agreement, after duly identifying the signatures of your orator and the said Lopez Landron, a written memorandum of the said contract signed by the said Rafael Lopez Landron, for himself and his wife and by your orator bearing a date just one day prior to the date of the notarial deed, and said offer was made in connection with uncontradicted proof that Damian Monserrat y Simo, the plaintiff bank's attorney, its president and a large stockholder therein, and the notary who drew up and signed the said notarial deed, was present at the office of the said Rafael Lopez Landron when the said agreement was made, participated in the discussion of the terms of the said agreement and was perfectly

familiar with them; and your orator says that a literal copy of the memorandum of the said agreement is as follows:

"This agreement entered into on this the thirteenth day of January, 1913, in San Juan, P. R., between Rafael Lopez Landron representing himself and as attorney in fact for his wife, as the party of the first part, and E. B. Wilcox, as party of the second part, witnesseth:

"1. That the party of the first part contracts to sell to the said E. B. Wilcox, the house and lot situated on Park st. in Santurce, San Juan, in which the said party of the first part lives at present with his family, which said house and lot is more particularly described in a certain mortgage given by the party of the first part and his wife to the members of the law firm, Sweet & Wilcox, upon said house and lot, bearing date of June 12th, 1912, being made before Hugh R. Francis, being number six of the protocol of said Francis; said party of the first part agreeing to sign the deed of sale for himself and wife as soon as the same may be ready for signing.

"2. It is further agreed that the price of the said house and lot shall be that amount for which appears in a certain judgment rendered by the Judge of the United States District Court against the said Rafael Lopez Landron and his wife in favor of the said Willis Sweet, as member of the late law firm of Sweet and Wilcox it being understood that the sale and transfer of the above named property is to satisfy the said judgment and the said E. B. Wilcox,
56 agrees to cancel the said judgment upon the signing of the said deed of sale as above provided.

"3. It is further agreed that the said Wilcox shall assume the incumbrances now existing against the said property which are duly registered in the Registry of Property, which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet and Wilcox.

"4. It is further agreed that any and all expense incident to the preparation of the deed of sale, stamps, etc. shall be paid by the party of the first part.

"5. It is further agreed that if within thirty days from the date of this agreement, the party of the first part shall so desire he may within said thirty days, repurchase from the said E. B. Wilcox the above named property by paying for the same amount named in the judgment referred to given by the Judge of the United States Court, together with the sum of five hundred dollars in addition thereto, it being understood that all necessary expenses in connection with the resale of the said property shall be paid by the said judgment and the sum of Five Hundred Dollars just named.

"6. It is agreed further that if the party of the first part does not conclude the repurchase of the property within the thirty days named, that he shall vacate the said premises promptly at the conclusion of the said thirty days, it being further understood that during the time mentioned within which the party of the first part may repurchase the said property, that he may remain living therein provided he pay a rental equal in amount to the interest for that time

payable to the Bank of Porto Rico upon the mortgage held by the said Bank against the said property.

"RAFAEL LOPEZ LANDRON,
Party of the First Part.
"E. B. WILCOX,
Party of the Second Part.
"*F. C. TIMPSON, Witness.*"

11. Your petitioner further *respectively* says that your Honor erred in not finding for your petitioner in the said cause No. 946 Equity, for the reason that the plaintiff bank, not having waived an answer under oath, that your orator answered the bill under oath, among other things alleging that the deed of transfer by which the property in question was transferred to your orator
57 from the said Lopez Landron and his wife, dated January 14, 1913, was null and void, because same was witnessed by parties who were the clerks, servants and employees of the said notary Damian Monserrat y Simo, who authorized the said deed, and further that the said deed was null and void because the said Monserrat was the attorney of the plaintiff bank, its president and one of its large stockholders, and thereby benefitted by the transaction, the sale of the property; and your orator says that these sworn statements were not overcome by the testimony of one or more witnesses, nor did the plaintiff bank offer any evidence of any character to contradict the said allegations, and your orator further says that the reformed complaint upon which the foreclosure suit is based is verified by the said Damian Monserrat y Simo, in which he states under oath that he is the president of the plaintiff bank. And your orator says that under these facts and Section 1998 of the Revised Statutes of Porto Rico, which reads as follows:

"The following public instruments shall be null and void:

"1st. Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.

"2nd. Where the relatives of the parties concerned therein, or the relatives, clerks, or servants, of the notary authorizing the instrument are witnesses thereto."

12. Your petitioner further says and respectfully urges, that your Honor erred in holding that your petitioner was liable for the payment of the mortgage of $1,700 sued for by the bank in the foreclosure suit, together with interest, costs and attorney's fees provided for therein, for the reason that it was shown by the witnesses of the plaintiff bank at the hearing that the said mortgage was to cover interest due and unpaid on the first mortgage of $4,666 held by the said bank against Lopez Landron, it being apparent upon the face of the bank's bill of complaint that the said mortgages drew the maximum rate of twelve per cent under the law of Porto Rico, and that the interest due on the first mortgage of $4,666 held by the said bank against Lopez Landron, *it being apparent upon the face of the bank's bill of complaint that the said mortgages drew the maximum rate of twelve per cent under the*

58 *laws of Porto Rico and that the interest due on the first mortgage* was thereby to draw twelve per cent per annum, and that the said mortgage was a usurious contract and not collectible under the laws of Porto Rico.

Wherefore your petitioner prays of this Honorable Court for the following relief:

That the decree rendered by this court dated August 25, 1916, in the cause of El Banco Popular etc. v. Elias B. Wilcox, equity No. 946 of this court, be reviewed and reversed and that no further proceedings thereon be taken.

That the rights of the parties to the suit entitled El Banco Popular de Economias y Prestamos de San Juan, P. R., v. Elias B. Wilcox, in equity 946, shall be declared and adjudged in this cause to be such as they were immediately prior to the signing of the deed of transfer of the property described in paragraph 2 of this bill by which the said Lopez Landron and his wife transferred the said property to your petitioner, dated January 14, 1913.

That the sale of the said property under the decree of foreclosure, to review which this bill is brought, be ordered suspended until the determination of this action, and for such other and further relief as the court may find to be just and equitable.

To the end, therefore, that the said Banco Popular de Economias y Prestamos de San Juan, P. R., may show cause, but not under oath, same being expressly waived, why your petitioner should not have the relief prayed for, your petitioner prays that a subpœna be directed to the said Banco Popular de Economias y Prestamos de San Juan, P. R., commanding its servants and officers at a certain time to show cause why the decree should not be reversed and such other relief had, as prayed.

JOSE R. F. SAVAGE,
WILLIS SWEET,
Solicitors for Petitioner.

I, Elias B. Wilcox, the petitioner herein, being duly sworn, say that I have read the above petition, and that the matters and things set forth therein are true.

E. B. WILCOX, *Petitioner.*

59 Subscribed and sworn to before me on this the fourth day of January, 1917, in San Juan, P. R.

ANTONIO AGUAYO,
Clerk of said Court,
By L. A. GROSS,
Deputy Clerk.

Motion to Dismiss.

[Filed January 20, 1917.]

Comes now the Banco Popular de Economias y Prestamos de San Juan, Porto Rico, by its solicitors, Frank Antonsanti and Damian

Monserrat, Jr., and pray that the bill of complaint herein filed by Elias B. Wilcox be dismissed for the following reasons:

1. Because the bill does not contain sufficient facts to constitute a valid cause of action in equity, in that from the allegations thereof it is shown that the complainant has not equitable relief.

2. Because it appears by the plaintiff's own showing by the said bill that he is not entitled to the relief prayed by said bill against the Banco Popular.

Wherefore, we pray that the said bill of review be dismissed with costs.

FRANK ANTONSANTI,
DAMIAN MONSERRAT, Jr.,
Solicitors for Banco Popular.

Acknowledged receipt of copy of above motion this twentieth day of January, 1917.

E. B. WILCOX,
Defendant.

Journal Entry.

January 3, 1917.

This cause was heretofore heard and submitted to the court upon the motion of the complainant, Banco Popular, etc., to dismiss the bill of review filed by the respondent in this case. The court having duly considered the motion, the same is granted. An opinion on the premises is filed by the court.

It is therefore ordered and directed that the bill of review herein be and the same is hereby dismissed, to which action of the court in dismissing the bill the respondent excepts. 69

Opinion of District Court.

February 3, 1917.

Motion to Dismiss Bill of Review.

Messrs. Frank Antonsanti and Damian Monserrat for motion.
Messrs. J. R. F. Savage and Willis Sweet for complainants in review.

HAMILTON, *J.*:

This is the third litigation connected with the question of the obligation of E. B. Wilcox to the Banco Popular in the matter of a second mortgage made by Rafael Lopez Landron and wife. Landron had executed, July 29, 1909, a mortgage in favor of the bank for $4,000 and made another mortgage to the bank December 3, 1912, for $1,700. The latter mortgage was not promptly recorded; in the meantime, January 14, 1913, Landron and wife made a deed to E. B. Wilcox. The main question is whether Wilcox at the time of receiving his

deed knew of and was bound by the second mortgage of Landron, which was not recorded until January 28, 1913. The foreclosure bill of the bank covered both mortgages, and, making Landron and Wilcox defendants, was filed June 9, 1914. By consent the case lay dormant until 1916, when testimony was taken and decree of foreclosure rendered August 25, 1916. The court having ruled that a cross-bill was not germane, defendant Wilcox filed a bill against Landron and the bank on June 30, 1915, in a suit numbered 975 Equity, seeking to reform the deed of sale of January 14, 1913. On December 20, 1916, a decree pro confesso was entered on the new bill and on January 4, 1917, a final decree was entered against Landron, the bill having been dismissed as against the bank. The sale under the foreclosure suit, No. 946, was had January 6, 1917.

It is sought by the bill of review now filed in cause No. 946 to have the proceedings and decree of foreclosure reviewed and set aside. A number of reasons are urged. Some of them were passed upon during the progress of the main suit and therefore need not now be considered. Others will be discussed.

61 1. A bill of review will not be allowed if performance of the decree is not shown, or a sufficient reason given why it has not been performed. Without this the bill is demurrable. If the original decree has not been performed, the new bill must ask that it be allowed without performance. (Simkins, Fed. Equity Suit, p. 633; Ricker v. Powell, 100 U. S. 167.) In the case at bar there is an allegation that the complainant "has not paid the amount of the judgment rendered against him in the decree aforesaid, and that he is not able to do so under the terms of the decree and the conditions of the sale." This is as stated rather a conclusion of the pleader than a statement of facts making up a sufficient reason why the decree was not performed. Nevertheless, it is an attempted statement of an excuse for a non-performance, and because amendable may be taken as sufficient upon a motion to dismiss which is not directed to this point in particular. It may possibly be construed to mean poverty, as is argued, and Chancellor Kent has considered the pretext of poverty a proper excuse for non-performance. (Wiser v. Blachly, 2 Johnson's Chancery, 488.) This bill of review was filed after leave obtained, so that it is not material whether leave is necessary or not in a bill of review for errors of law. It is held that a bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. (Thomas v. Harvie, 10 Wheat. 146). This court is always ready to consider a decision which is doubtful in law.

2. There does not appear to have been a necessity for a bill of review. In case No. 975 there could have been a consideration of all original equities between the three parties interested which could not be raised in the answer to the bill in No. 946. This seems to have been contemplated, but at the last moment the plaintiff considered that a decree pro confesso against Landron, who had left the island and whose representation by counsel was uncertain, would fix all rights in regard to the property. Thereupon the plaintiff dismissed

the bill as to the bank and was left with a decree pro confesso as to Landron and relies upon it. He voluntarily gave up the opportunity to litigate the points at issue with the principal party in interest, that is, the bank, which he had by amendment eliminated.
62 But the decree he did obtain was not binding upon the bank, because the bank was no longer a party. It does not seem equitable for a plaintiff to prosecute a bill of review to cover remedies which were obtainable in a suit which he voluntarily dismissed as to the main party in interest.

3. Passing, however, to the merits of the bill of review, it is claimed that the deed from Landron to Wilcox was void because the witnesses were the clerks, servants and employees of the notary, and because the notary, Monserrat, was attorney and president of the plaintiff bank and one of its large stockholders. The illegality claimed arises under Section 20 of the Notarial Law of Porto Rico of March 8, 1906, being Section 1998 of the Compilation of 1911, which is as follows:

"The following public instruments shall be null and void:

"First. Those in which the notary authorizing the same has intervened as a notary thereto, or which contain any provision in his favor.

"Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument are witness thereto. * * *"

The notary in question, however, did not intervene as a party to the deed, nor did it contain any provision in his favor. The only interest alleged is that the notary was connected with the bank; but the bank was not a party to the deed now complained of. Moreover, the bank was one individual and the notary was another. It may be bad practice in connection with matters of proof for a bank official to act as notary also for the bank, but it does not make illegal the conveyances certified by the notary.

4. There was no evidence offered that the relatives, clerks or servants of the notary were witnesses, and the ground upon which this objection is based is technical. The statement that they were such is contained in the sworn answer of the defendant, and, this sworn answer not having been controverted, it is claimed that the result was an admission of the fact, without necessity for offering the answer in evidence. (Simkins, Fed. Equity Suit, p. 437.) New
63 Equity Rule 31 says that "unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. * * * In default of a reply, a decree pro confesso on the counter-claim may be entered as in default of an answer to the bill." The new procedure presents the difficulty that the set-off or counter-claim is a part of the answer and is not a separate paper, and so the set-off or counter-claim must be determined from the contents and not from the form of the paper. There was no decree pro confesso on the answer as a counter-claim, which would be the proper procedure if the answer

was of this character, and so no question arises on this score. On the other hand, if the allegation that the instrument is void, on account of the interest of the notary and the like, is to be deemed new or affirmative matter merely, then under Rule 31 this is deemed to be denied by operation of law. In neither view could the proceedings in case No. 946 amount to an admission of this allegation of the answer, and so the court did not err in this regard in rendering the decree actually made.

5. It is also set up that there was an error in the decree because the second mortgage was void in that it covered interest upon interest. The Porto Rican law avoids the usury, not the principal. (Act March 1, 1902, Sec. *e;* Compilation 1911, Sec. 4175.) The new mortgage, however, is not shown to transgress any law. It purports to be for a certain additional advance plus interest then accrued. In other words, the transaction amounted to a rest, at which interest then due was figured out and not paid. In such case it ceased to be interest and became a debt which could be deferred, secured by mortgage, or handled in any other way the parties saw fit. The amount of interest is large, but does not exceed what is allowed by contract under the local law. There is no showing that there was any fraud or that any advantage was taken which calls for the interposition of a court of equity. Moreover, if there is any mistake in the amount due under the decree for foreclosure, it could have been brought up by exception or by motion ques-
64 tioning the amount figured by the clerk and adopted by the court. There was no need for an independent proceeding in this regard.

Whether, therefore, the bill of review be considered on ground of practice or on the merits it is improper under the circumstances, and should either not have been allowed originally or be dismissed now.

It is so ordered.

P. J. HAMILTON, *Judge.*

San Juan, P. R., February 3, 1917.

Testimony of Witnesses.

[Filed June 8, 1917.]

JUAN DE FERNANDO, for Plaintiff,

States that since 1910 he has been treasurer of the plaintiff bank and as treasurer has intervention in the books and accounts of the bank; that in his capacity as treasurer he came to know of a transaction of a mortgage of $4,600 and another of $1,700 which appear on the books of the bank, from which it appears that Mr. Wilcox has an open account as to those two mortgages and that from the bank books and as he knows interest is due since the third of August, 1913. The account appears in the mortgage book, page 216 of which was admitted as evidence and was read and is as follows:

"Mortgage of Elias B. Wilcox. Interest payable every four months in advance at twelve per cent per annum. Lot with two story house of wood and zinc. Date on which mortgage falls due, July 29th, 1910. Now in pencil: '17th Dec. 1913.' Also in pencil: 'Transferred by Rafael Lopez Landron. Date Jan. 16th, 1913.' Another column. Detailed items. Costs $500.00. Amount due $6300.00. Payment of interest, date Aug. 9th, 1913. Amount $252.00 up to Aug. 3rd, 1913. December 12th, item insurance, amount due $108.68. Total $6408.68. 1914, Dec. 18th, item insurance. Amount due $108.68. Total $6517.36. 1915, December 18th, insurance on $6000.00, $94.15. Total $6611.51."

Which amount represents the amount of the mortgage and premiums paid for insurance without interest being calculated on that
65 amount. The sum of $6,300 is the total of the mortgage of Rafael Lopez Landron for $4,600 and an additional mortgage for $1,700. Mr. Wilcox paid the sum of $252 as interest on the sum of $6,300 for four months, for which a receipt was issued him; no interest has since been paid.

Cross-examination:

The seventeen hundred dollar loan originally was an additional mortgage; an enlargement of the mortgage. I don't remember if the amount was a loan in cash. He believed that the additional amount was in part interest owing by Lopez Landron and that the balance may have been in cash. He is not able to state accurately how much of the $1,700 mortgage represents interest and how much represents cash. A memorandum before me shows interest in the amount of $1,480, which is the amount of the interest on $4,600 and the last item of $252 for four months interest from December 3, 1912, to 3d of April, 1913, which last named item is included in the amount of $1,480.20, and the difference between the amount of $1,480.20 and the $1,700 was paid to Mr. Landron in cash. He was acting as treasurer and cashier of the bank at the time this transaction took place.

E. B. WILCOX, the Defendant,

Stated that he resides at Toa Baja, P. R., and is a lawyer.

[Here it was stipulated that at the time the papers were executed that Mr. Monserrat was the president of the plaintiff bank and a stockholder therein.]

Being handed a paper witness said: This is the complaint in case No. 912 Equity, in which Willis Sweet and E. B. Wilcox are the complainants versus Rafael Lopez Landron and wife as defendants.

[Admitted as evidence and marked "Exhibit A for the Defendant."]

Referring to a paper handed him: This is the decree entered by the court in the case of Willis Sweet and E. B. Wilcox v. Lopez Landron et al., in Equity No. 912.

[Admitted as "Exhibit B for Defendant."]

Being handed another paper: This is the return of the
66 marshal of this court and attached thereto is the printed notice of the master's sale in the case mentioned and also a certified copy of the decree rendered in the same.

[Document admitted as "Exhibit D for Defendant."]

The date of the mortgage given to Sweet and Wilcox was in June and same was recorded about the 10th or 12th of June, the same month of 1912. I made a purchase of the real estate from Lopez Landron that is described in the plaintiff's bill, which deed was filed in the recorder's office for recording some time after the 14th of January, 1913. I did not file it myself. I am not acquainted with a paper which has been offered in evidence and referred to in the bill of complaint as a mortgage for seventeen hundred dollars from Lopez Landron and his wife to the plaintiff. I have seen it for the first time in this hearing. The first time that I ever heard of its existence was some time in the early Spring of 1913, several weeks after the purchase of the property by me from Mr. Lopez Landron. When I went to sign the deed of sale under which I took over the property in question from Mr. Landron I took the document which was handed me by Mr. Monserrat and glanced at the first part of it very hastily. I was in a hurry. The agreement under which it was to be drawn up had been entered into only a day or two before, at which Mr. Monserrat was present, and in the discussion of which he took part, and he assured me, on my asking him, that it was all right. I asked him if it was drawn up in accordance with the agreement that we had made with Mr. Landron and he stated to me that it was. And thereupon, without reading the document further, I took the pen which he handed me and signed it. Mr. Landron was not present.

The facts leading up to the agreement mentioned were these: As Judge Sweet and myself were about to advertise the sale of Mr. Landron's property to satisfy our judgment obtained in Equity No. 912 in this court, Mr. Monserrat came to me and said that there might be some way in which the matter might be settled without subjecting Mr. Landron to the humiliation of advertising his property for sale. He said that this was an ugly thing among lawyers.

Mr. Monserrat was present when the agreement referred to
67 was entered into between myself and Mr. Landron. Mr. Monserrat suggested and insisted upon the arrangement. He said to me that he believed that Mr. Landron would be willing to transfer the property to us in satisfaction of our judgment against him and he desired me to accompany him to the office of Mr. Landron to discuss the matter. I made an engagement with Mr. Monserrat to go to Mr. Landron's office some two or three days afterwards. I don't recollect how long afterward, but at the time agreed upon we

went together to Mr. Landron's office. Mr. Timpson, who had an office on the same floor with me representing a fruit association, went with me. I requested him to go and be present.

There were present Mr. Timpson, Mr. Landron, Mr. Monserrat, the notary, and myself. The proposition was discussed for a considerable length of time. I knew that the bank had a mortgage upon the property. There was a great deal said at this conference, but it was finally agreed between Mr. Landron and myself and others, including Mr. Monserrat, being present, that I would take a transfer of this property in satisfaction of our judgment of some eighteen hundred dollars, and that I would agree to become responsible for the mortgage indebtedness that appeared on the books of the registry of property recorded as of any date or dates prior to the date of the mortgage that had been made by Mr. Landron on this property in favor of Sweet and Wilcox, and that the purchase price which should appear in the deeds should be the amount of the judgment of Sweet and Wilcox. There was nothing said about a mortgage of seventeen hundred dollars nor was there anything said that might have led me to suspect that there was any other mortgage indebtedness except the mortgage that I knew the bank had, that for $4,600.

The discussion was held both in Spanish and English. I do not mean to say that Mr. Monserrat nor Mr. Landron spoke any English, but now and then both languages were used. Mr. Landron understands some English and reads it very well, I know of my own knowledge, but as is often done when Americans and Porto Ricans are talking together, we frequently exchanged language, but the use of the Spanish largely predominated. If there was any Eng-
68 lish used, it was a word here and there when the speaker could not make himself understood clearly in Spanish and used the English. We agreed that this agreement should be reduced to writing. [The witness is handed a paper.] This is the written memorandum of the agreement mentioned.

[The memorandum was offered as evidence; on being objected to, it was rejected, defendant excepted, but was allowed to read same, which he did as follows:]

"This agreement entered into on this the 13th day of January, 1913, in San Juan, P. R., between Rafael Lopez Landron, representing himself and as attorney in fact for his wife, as the party of the first part, and E. B. Wilcox as party of the second part, witnesseth:

"(1) That the party of the first part contracts to sell to the said E. B. Wilcox, the house and lot situated on Park or Tren street in Santurce, San Juan, in which the said party of the first part lives with his family, which said house and lot is more particularly described in a certain mortgage given by the party of the first part and his wife to the members of the law firm of Sweet & Wilcox upon said house and lot, bearing date of June 12th, 1912, being made before Hugh R. Francis, being No. 6 of the Protocol of said Francis; said party of the first part agreeing to sign the deed of sale for himself and wife as soon as the same may be ready for signing.

"(2) It is further agreed that the price of the said house and lot

shall be that amount for which appears in a certain judgment rendered by the Judge of the United States District Court for Porto Rico against the said Rafael Lopez Landron and his wife in favor of the said Willis Sweet and E. B. Wilcox, as members of the late law firm of Sweet and Wilcox, it being understood that the sale and transfer of the above named property is to satisfy the said judgment and the said E. B. Wilcox agrees to cancel the said judgment upon the signing of the said deed of sale as above provided.

"(3) It is further agreed that the said Wilcox shall assume the incumbrances now existing against the said property which are duly registered in the Registry of Property which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet and Wilcox.

"(4) It is further agreed that any — all expense incident
69 to the preparation of the deed of sale, stamps, etc. shall be paid by the party of the first part.

"(5) It is further agreed that if within thirty days from the date of this agreement, the party of the first part shall so desire, he may within the said thirty days, repurchase from the said E. B. Wilcox the above named property by paying for the same the amount named in the judgment referred to given by the Judge of the U. S. Court together with the sum of Five Hundred Dollars in addition thereto, it being understood that all expenses necessary in connection with the resale of the said property shall be paid by the party of the first part in addition to the amount of the said judgment and the sum of Five Hundred Dollars just named.

"(6) It is agreed further that if the party of the first part does not conclude the repurchase of the property within thirty days named, that he shall vacate the said premises promptly at the conclusion of the said thirty days, it being further understood that during the time mentioned within which the party of the first part may repurchase the property, that he may remain living therein, provided he pays a rental equal in amount to the interest for that time, payable to the Bank of Porto Rico upon the mortgage held by said bank against said property."

I recollect having made a payment of interest, but not the date. The payment was made some little time after the 14th of January, 1913, within a month or so after that date. I refused to make any further payment of interest because soon after I made the payment I refer to I made an investigation as to the contents of the deed of sale. When the bill for the interest was sent to me it seemed to me that it was very high. I concluded that Mr. Landron must have left several quarters of interest unpaid, and the bank was trying to collect some of his unpaid interest out of me. However, I decided to look the matter up carefully, which I did and ascertained then for the first time that there was a purported mortgage for seventeen hundred dollars ($1,700), and after that I refused to pay any further interest.

Cross-examination:

The interview at which the agreement was made which is set out in the document above read took place in the office of Mr. Lopez Landron on Fortaleza Street. Mr. Monserrat requested me to
70 go there. He came to me and made the request verbally. I don't recollect whether I was in my office or on the street when Mr. Monserrat made the request. I do not recollect having but one conversation with Mr. Monserrat in connection with my going to Mr. Landron's office to see him about the matter. This conversation was some two or three days before we went to Mr. Landron's office. After the conference which we held in Mr. Monserrat's office, at which we came to the agreement which I have read, I did not again see Mr. Monserrat until I went to his office to sign the deed of sale.

I stated in substance that when I asked Mr. Monserrat, when I went to sign the deed, if it contained the agreement that Mr. Landron and I had made, and upon his stating that it did, I signed it. All the agreement made upon the occasion mentioned was incorporated in the document above read. Both Mr. Monserrat and Mr. Lopez Landron offered to assist me in finding purchasers for the property, the idea being that we wished to dispose of it for sufficient for them to get their money out of it and for me to get what was due me. I do not urge this offer as a legal obligation. I did not go to the recorder's office. I did not know the amount of the incumbrances existing upon the property at the time.

I signed the bill of sale of the property without knowing what incumbrances there was against it. Mr. Monserrat insisted. He was the one who seemed most anxious for the arrangements to go through. He stated that he was anxious not to have any publication against Mr. Landron. The document that I read in court was drawn up in my office; I drew it up. I don't know that Mr. Monserrat ever saw this agreement; I never showed it to him. Both Mr. Monserrat and Mr. Landron stated to me that the bank held a mortgage for $4,600 in Mr. Landron's office in the course of the conversation. In this way I came to understand that it was this amount only that Mr. Landron owed the bank on this property. I am quite certain that Mr. Monserrat had told me before in his conversation with me.

At this time I did not go to the recorder's office to ascertain the amount of the incumbrances, but some time before that, when
71 Sweet and Wilcox agreed to take a second mortgage upon the property to secure our judgment, I then went to the recorder's office to look the matter up, and ascertained that there was this mortgage for $4,600. When I drew up the document mentioned and read, I did not know of any incumbrance except what Monserrat and Landron told me of. I do not know that Monserrat does not understand the A. B. C. of the English language; I don't remember that I ever conversed with him in English. Mr. Monserrat drew up the deed of sale for the property.

It was agreed between Mr. Lopez Landron and myself, and Mr. Monserrat was present and heard the conversation and the agree-

ment, that I would pay and accept whatever incumbrances that might appear of record on the recorder's books, which were recorded as of a date prior to the date of the mortgage that was held and owned by Sweet and Wilcox. The mortgage of forty-six hundred dollars was referred to during the course of the conversation, and no other mortgage was referred to. I do not recall whether in the agreement the mortgage is referred by amount. I think that there is a reference in the document, the agreement, to the first mortgage and I think that the amount is stated, although I am not sure. [Examining the agreement.] There is no reference to any particular mortgage. By the statement therein made I was protecting myself. I suppose that under the circumstances I might have known that there was interest unpaid, but my understanding was that Mr. Landron had paid the interest that was due up to date, and that the bank had collected it. I don't recollect to have stated in my answers that I would assume the payment of the mortgage and the interest thereon. I don't recollect to have asked Mr. Landron how much interest he owed on this $4,600 dollars mortgage. I think that I assumed that he had paid it. I have not paid taxes on the property. I collect the small rent that I have been able to rent the property for. I have never gotten over thirty-five dollars a month from it; I am getting twenty at this time. I occupied one room that was vacant for two or three months. My understanding was that I was to accept the payment of the forty-six hundred dollar mortgage with interest thereon.

72 Mr. Timpson went with me to Mr. Landron's office at my request. I wouldn't like to say that I was fearful of either Mr. Landron or Mr. Monserrat. I wanted Mr. Timpson as a witness. Mr. Timpson and I were at the office of Mr. Landron while Mr. Landron and Mr. Monserrat were there, as stated. I am so sure of this fact that I remember other conversation than that having direct reference to the agreement mentioned. There was a conversation between Mr. Monserrat and Mr. Landron as to why Mr. Landron had not been a financial success. This conversation could have happened elsewhere and on the street, but I was never in my life elsewhere with these two parties than in Mr. Landron's office on the occasion mentioned. We were speaking there of the fact that Mr. Landron was to lose his property; that it was painful and there was a discussion there which revealed the fact that Mr. Monserrat and Mr. Landron were perhaps boyhood friends and schoolmates. From these facts I am certain that Mr. Monserrat was present and that there was a discussion as to why Mr. Landron had not succeeded financially. This conversation might have happened elsewhere, but it did not. Mr. Monserrat took part in the conference in the use of the Spanish language; little English was used.

After this conference and the agreement read in evidence, two or three days transpired after the agreement mentioned was made before I reduced it to writing. I did not draw the agreement in writing at the time because I had to use my own typewriter. Mr. Landron had a typewriter I presume. He had then a law office. It was agreed that I should reduce the agreement to writing and

send it around to Mr. Landron for him to examine, and if it did not conform to the agreement made on the date of the conference mentioned, he was to call my attention to it and the memorandum was to be made to conform to the said agreement; that Mr. Landron was to correct it. It may have been the same day that I prepared and sent around the memorandum to Mr. Landron, but in any event it was so short a time after the conference at which the agreement was made that the facts were fresh in mind.

I drew up the original and made one copy, and signed both of them and gave them to Mr. Timpson to take to Mr. Landron
73 and he returned with my copy signed by Mr. Landron. I presumed that Mr. Monserrat when he should draw the deed would incorporate in the deed of sale the agreement entered into between Mr. Landron and myself for the reason that Mr. Monserrat was present and heard us reach the agreement. I drew the memorandum for the purposes for which a memorandum serves. The memorandum of the agreement was signed just one day before the deed was signed. According to the agreement, Mr. Landron could repurchase the property. Mr. Monserrat heard this part of the agreement. The document was signed January 13th, and the deed was signed January 14th, one day afterward.

Direct Testimony of Frederic C. Timpson, for Defendant.

My age is forty-eight; residence, San Juan, P. R.; I am manager of the Fruit Growers' Association. I am acquainted with E. B. Wilcox, whom I have known about ten or twelve years; with Rafael Lopez Landron, whom I have known about eight years, and with Damian Monserrat, Sr., whom I have known for six or seven years. I was present at a conference between Mr. Wilcox, Mr. Monserrat, Sr., and Mr. Lopez Landron relative to the settlement of a claim that was held by Mr. Wilcox against Mr. Landron. The conference took place in Mr. Landron's office in the Ordonez Building. I believe that it was in January, 1913. I understand Spanish better than I speak it; I understood it pretty well then. I understood the substance of the conversation; some of the conversation was in English. I sat just outside the office. When I returned with Mr. Wilcox to the office I knew more about it, but in the office I understood some of the conversation. I was practically in the same room with the parties present. There was a little partition separating a hallway and I sat in the hallway and Judge Wilcox was in the office of Mr. Landron. There were arches. I know what my impression of what occurred was that day, but whether I got the entire facts that day or a few days afterwards, I am not able to say now. It may have been that I got some information at the office and the rest of it from Mr. Wilcox upon returning to his office.

74 My recollection was that the agreement referred to a mortgage for $4,600 or for $4,700. I served some papers upon Mr. Landron two or three days later. Whether I got the impression at the time or later after I left the office, I am not confident at this time. In saying the papers that I served upon Mr. Landron

two or three days after the conference, I mean the agreement that I witnessed. The amount in that paper was the amount I understood because when I served the paper it was the same that I understood it to have been. The paper stated the agreement as I understood it.

Cross-examination:

I am not certain I heard the amount mentioned at the conference or at the office of Mr. Wilcox after we returned. Mr. Landron read the memorandum of the agreement when I took it to him. He read it before he signed it. I had two papers. My instructions were to sign the paper when Mr. Landron signed it. He read the paper. It was not my mission to sign as a witness to Mr. Landron's signature. It seemed strange that when I had two papers to serve that I should have Mr. Landron sign the paper. I think that he took the carbon copy and I said this is the original, and he said all right, either will do. I signed the paper as a witness; that I served this paper; that I delivered it to Mr. Landron. I didn't pay much attention to the conversation had at the office of Mr. Landron. There were two or three people there. He did not tell me why he wanted me to go to Landron's office with him, but I had a talk with him (Mr. Wilcox) two or three days before about the Landron property. As to the amount, I heard what appears in the paper; my recollection is that the paper is correct. Whatever the paper says as to amount is correct, whether forty-six or forty-seven hundred dollars, or seventeen hundred dollars. I saw Mr. Monserrat there that day. I did not see him through a partition; there was a succession of arches. Mr. Monserrat was talking with Mr. Wilcox in Spanish. Mr. Wilcox talked some English, I think, to Mr. Monserrat. I don't recollect whether he answered or not. I recollect that this was in January, 1913, because my attention was called to it—I saw the paper. The paper has been shown me to refresh my memory. By reading the paper it is a fact that I have re-
75 freshed my memory. It is not a fact that the matter was entirely gone out of my mind until I had my memory refreshed. I had other papers. I went to Mr. Landron's office twenty times concerning other papers of other persons. It is not a fact that this transaction had been dismissed from my mind until Mr. Wilcox showed me this agreement. I remember going to and coming from the office, and I remember the amounts mentioned in the document, which was discussed there. I don't recall any amount of five hundred dollars. I don't recall any special condition spoken about. There was a conference between Mr. Landron and the others. I don't know what they finally agreed; I didn't know until two or three days afterwards what they finally agreed until I came to serve the paper.

I got the impression at the time and afterwards that what appears in that paper was what was agreed upon at the office. At the office I understood that the amount was forty-seven hundred dollars. I don't recall hearing any amounts mentioned besides the one for forty-six or forty-seven hundred dollars. I did not, to the best of my recollection, hear anything about an amount of five hundred

dollars. I did not hear any special condition attached to this sale or this transfer of the property. I heard about the forty-six or forty-seven hundred dollars; it was all that I got clear out of the transaction. I understood that it was in settlement of a judgment that Mr. Wilcox had in this court against Mr. Landron, a judgment that had been put into a mortgage and the mortgage was upon Mr. Landron's property, and Judge Wilcox was to have a conference about taking it over. I am sure of this. I inferred that the forty-six or forty-seven hundred dollars was in settlement of this claim in payment of the judgment. I thought it was the amount of the judgment.

Testimony of Damian Monserrat Simo, for Plaintiff.

I am a lawyer and a notary public. I am acquainted with Mr. Wilcox and with Mr. Landron. I don't remember to have been present at a meeting at Mr. Landron's office during or about the month of January, 1913, at which Mr. Wilcox, Mr. Landron
76 and Mr. Timpson were present. I don't remember having met these gentlemen nor having gone there for that purpose.

[Being shown a deed marked "Exhibit B for the Plaintiff."]

I participated in drawing this deed. It was executed before me. Mr. Wilcox appeared before me personally and signed it in my presence. In accordance with instructions which he gave me I took down my notes. Then I asked the other party if he agreed with that contract and he answered affirmatively, and, as it is the rule or the custom in my notarial office, I then drew up the document. Of course this took place on a certain day to be carried out or executed on the next day upon his return from the country. He did come; I showed the document to him, he read it and then I asked him whether he had any remark to make and he said that it was all right in accordance with his notes and what he had agreed to, and then he signed the document and that is all. I am absolutely sure of this because I have been engaged for many years in my profession and I instruct the parties and do or act accordingly.

The recitals in the deed as they appear are the result of whatever agreement that was given me by Mr. Wilcox and Mr. Landron, as I understand it, otherwise I would not have drawn it in that way, and so much so that he came to me many times asking that the bank would wait for him on the interest which he owed and did not pay. Thereafter I addressed him a letter asking him to pay the taxes on the house unpaid amounting to eight hundred or a thousand dollars — unpaid from the time he purchased the house, notwithstanding the fact that he collects the rent and does not pay the rents which he collects and does not repair the house.

I was not present when the agreement made between Mr. Wilcox and Mr. Landron was made; this is the first time I ever saw that document. It is a sort of agreement which was drawn up behind me, because otherwise it would have been seen by me. I could not read it and tell the court what it is; I do not understand the

English language; I cannot read a newspaper in English. After reading the deed Mr. Wilcox appeared satisfied with it, not only at the particular time, but on other occasions when he came to my office to talk with me about the matter, afterwards. He came
77 to my office to get a respite from the bank to give him more time to sell the property, and I always afforded him all facilities so as to enable him to make whatever transaction he could make.

Mr. Wilcox took the copy of the deed himself from my office, which copy was written clearly on a typewriter. He never made any complaint in regard to the seventeen hundred dollar mortgage. He showed himself very grateful for the bank's having waited on him. I delivered the copy of the deed to Mr. Wilcox immediately, —either on the next day or two days thereafter.

Cross-examination:

Mr. Wilcox furnished me with the date upon which the deed from Lopez Landron to him was drawn. The two parties did not call upon me together for that purpose, but they did thereafter in order to execute the contract. Of course they were together in order to sign the deed. My interest in this matter is no other than that of a notary, in the preparation of the deed. I certainly did deliver a copy of the deed, personally, to Mr. Wilcox, not at the very moment, but allowing for the time to strike the same with the typewriter, whether the next day or two days afterwards. I am sure that I delivered a copy of the deed to Mr. Wilcox, so much so that he has it in his possession.

"× Q. 1. Are you sure that you did not deliver it to Mr. Timpson?

"A. It might be that he sent for it, but I do know that I delivered a copy of the deed to him or to his representative, that is to say, a copy of the deed for one of the contracting parties.

"× Q. 2. Then you are not absolutely sure that a copy of the deed was delivered to Mr. Wilcox, personally, at the time?

"A. I am a notary who am satisfied that I am complying with my duties; the part as to which I vouch is as to the certainty of the text of the clauses embodied in the contract, but as to those outside details which bear no essential importance that my attention is not expressly attracted to that in a case of a man like myself who draws up thousands of deeds.

"Mr. Sweet: I will have to press for an answer to the question, if your Honor please."

The last question is repeated to the witness by the interpreter.

78 "A. I do know that such a deed was in his possession because Mr. Sweet himself came to see me.

"The Court: Mr. Interpreter, please repeat the question and tell the witness to answer the question and not talk about something else.

"A. I believe, or hold myself, that I delivered it, but it may be that he sent for it by some other person."

It is customary when the grantee of a deed calls for a copy for him to pay for the copy. I don't remember whether Mr. Wilcox or Mr. Timpson paid for the copy when I delivered it; I do so much work free for my colleagues. The amount of the stamps for one copy for the notary is fifty cents. Now as to the stamps necessary for recording of the deed, that is not a matter that concerns me. That is up to the Registrar. [Examining a paper handed him.] This is the copy of the deed of sale from Mr. Landron to Mr. Wilcox; it is the copy made by me; it appears thereon that it was made for the purpose of delivery to Mr. Wilcox. I do not remember who furnished and paid for the stamps, not for the notary, but those required to record the document; that is something that does not concern me. It forms no part of my duty. The interested party would be the one under the obligation under the ordinary practice to furnish and pay for them. I received instructions on one day as to how to draw the deed and perhaps on the next day the paper was ready. The parties do not sit there all the time the deed is being prepared; as a rule they do not. Then of course the parties got together, at least twice, before the notary. The first time Mr. Wilcox gave me the instructions for drawing the deed, in my office. When the paper was executed Mr. Wilcox read the paper over entirely. He read it himself and thereafter I read it to the witnesses and to him the second time. In this case and it is my invariable practice to notify the witnesses that they may waive the reading of the instrument.

Redirect examination:

I told these witnesses that they had the right to waive the reading of the document, and then I read the document to them. No document is signed before me without my reading it to the
79 parties or without the document being read by the parties themselves. Mr. Wilcox read the document carefully and I reread it to the witnesses.

RAFAEL LOPEZ LANDRON, Witness for Plaintiff.

I have been a lawyer for about thirty years in San Juan; I am acquainted with Mr. Wilcox. I owed Sweet and Wilcox a sum of money which I have paid them. If you point out the year to me, I might be more accurate as to the circumstances, and as to how I paid them. I was the owner of a house in Park Street, Santurce. I don't remember the date. I remember the main features of the transaction, but not the minor details, which on account of the lapse of time I am not able to recollect. I paid the debt by giving Mr. Wilcox the house and he assumed charge of the mortgages. The property was subject to the mortgages which had been constituted thereon by me, one first mortgage for $4,000, to the best of my recollection, which had been standing for some years back. I kept on

paying the interest thereon to the bank until the year 1912, when the deal with Mr. Wilcox came up.

I gave the second mortgage to the bank of $1,700 a long time before the deal with Mr. Wilcox. The sum of $1,700 which constituted the second mortgage to the bank was made up largely of arrears of interest unpaid due on the mortgage of $4,000. A part of the seventeen hundred dollars was taken in money, the exact amount of which I don't remember. On account of a complaint filed against me, a judgment for over a thousand dollars was rendered against me, and later I gave him a mortgage to secure certain promissory notes. The property appeared assessed in the Treasury Department at $13,000 to the best of my recollection.

The property was indebted to the Banco Popular for $4,000 on the first mortgage and in addition another of $1,700 as I remember in favor of the plaintiff also, and besides the mortgage which I had given to secure the payment of the promissory notes of over a thousand dollars given to cover the judgment for that amount. I think that I remember that Mr. Wilcox came to my office in the last days of December of 1912, or the beginning of January of 1913, to talk about this settlement. I am almost sure that he came into
80 my office twice to talk about this matter, but I don't remember the date at this time. He came to my office once or twice about this matter, I don't remember which. After four years it is impossible. I don't remember whether we arrived at an agreement or whether the agreement was made with Mr. Pettingill. Mr. Pettingill came to me in behalf of Mr. Wilcox to notify me that he would accept no other form of payment nor extension of time. I am not sure what Mr. Pettingill had to do with it, but in the manner in which he expressed himself it seemed to me that he had the representation of Mr. Wilcox. I agreed either with Mr. Wilcox or Mr. Pettingill to give the house with the liens, taking charge of them.

These liens were a mortgage for $4,000 in favor of the Banco Popular, a first mortgage, a second mortgage in favor of the same for $1,700, a third mortgage of one thousand or more dollars to secure the payment of the promissory notes, and that was the price of the house, and I remember that I said that the house is worth more than $13,000, I spent therein a large fortune.

It has more than thirty-one apartments or rooms. I gave the house to Mr. Wilcox in payment of what I owed him. He was to assume the mortgages for $4,000 and $1,700. I don't remember that Mr. Wilcox was at my office with Mr. Monserrat in reference to this matter. [Handing the witness the document which Mr. Wilcox read into the record.]

I am not an absolute master of the English language, but as to the meaning of this document and especially paragraph 3 it seems to me that it is also agreed that Mr. Wilcox will assume the liabilities now standing against said property which are duly recorded in the Registry of Property. I took it to myself that they were recorded and it was to be presumed that they were recorded when I signed this document which I had signed already. At that time I had no interest in the house; I considered it a loss.

I believe that I remember very well that while I was in my office on Forteleza Street an American whose name I do not know, but who used to attend to some business for Mr. Wilcox, brought me what had been agreed upon drawn up in English, I suppose by
81 him. I glanced over the document; I didn't see anything objectionable in it. I don't know the English language thoroughly. I thereupon signed it, and I signed under the impression that I had nothing whatever to do with that house because I had already offered it to him. After the mortgage of $4,600, I made the one for $1,700. The date of the mortgage in favor of Sweet and Wilcox is June 12, 1912. [Examining the mortgage for $1,700.] This mortgage bears date subsequent to the one given in favor of Sweet and Wilcox.

FREDERIC C. TIMPSON, for Defendant, Recalled.

[Examining a paper handed witness.] I identify this as the deed of sale of the Landron property which I filed in the recorder's office for Mr. Wilcox. I got this deed of Mr. Monserrat at his office. Mr. Monserrat gave me stamps at the time I took the deed; these were the stamps for recording the deed. I think it was the same day Mr. Wilcox wrote a letter to Mr. Landron requesting some twelve or thirteen dollars' worth of stamps to put on the deed which Mr. Monserrat had ready and I delivered that letter and signed my name on the carbon copy. I did not get the stamps. Then Mr. Wilcox sent me to Mr. Monserrat's office and I there got this deed and stamps and took it to the registrar's office and filed it. I went to Mr. Monserrat's office, I think, on January 24th, on the same day that I took the deed to the recorder's office and filed it. Mr. Wilcox sent to Mr. Monserrat's office to get the deed. I don't remember whether I went and got it after it was filed. I distinctly remember the letter I took to Mr. Landron for the stamps. After delivering the letter to Mr. Landron I went back to the office of Mr. Wilcox and told him that I did not have the stamps, and the next day or that afternoon Mr. Wilcox told me to go to Mr. Monserrat's office. I took the letter to Mr. Monserrat; I suppose that Mr. Monserrat knew me. I told him that Mr. Wilcox had sent me there to get the stamps for the registrar. I took the deed to the registrar for registration. I went to the notary and asked for the stamps.

82 E. B. WILCOX, Defendant, Recalled.

This Exhibit E for the Defendant is my copy of the deed of sale from Mr. Landron to myself. I did not pay for it. I do not know who paid for it; I did not. I did not pay for those stamps; as to who did I only know that, some time after the recording of my copy of the deed, one day I was in conversation with Mr. Monserrat and he was talking about how poorly he was getting out of the business of his mortgage with Mr. Landron, and he said to me that he even had to pay for the stamps for Mr. Landron with which I

had recorded my copy of the deed. The estimate of the value of the property placed upon it by Mr. Landron is too high, I would say, judging from what I have been offered for the property. Mr. Landron had a contract to repurchase the property within thirty days, which was made to give him the opportunity to sell it for enough to pay all the indebtedness and have something over for himself. He did not repurchase.

O. K. No objection.
FRANK ANTONSANTI.

August 25, 1917.

Foregoing narrative form of testimony approved.
P. J. HAMILTON, *Judge*.

Assignment of Errors.

[Filed February 24, 1917.]

And now, on this the twenty-fourth day of the month of February of the year 1917, comes the defendant by his solicitors, Willis Sweet and Jose R. F. Savage, and says that the decree entered in the above cause on the twenty-fifth day of the month of August, 1916, is erroneous and unjust to the defendant for the reasons below assigned:

1. Because, it appearing that on July 28, 1914, complainant filed a motion to strike defendant's answer, a copy of which is hereto attached marked "Exhibit A" and is made a part of this assignment; that on July 29, 1915, the court having overruled the said motion, the court erred in granting a motion to dismiss the
83 said answer, said motion being dated November 13, 1915, a copy of which is hereto attached marked "Exhibit B" and is made a part of this assignment, to which defendant then and there excepted.

2. Because the court erred in granting complainant's motion to dismiss the defendant's answer, said motion being dated November 13, 1915, a copy of which is hereto attached marked "Exhibit B" and is made a part of this assignment, to which defendant then and there excepted.

3. Because it appearing that complainant on July 29, 1914, filed a motion to strike defendant's cross-complaint, a copy of which is attached hereto marked "Exhibit C" and is made a part of this assignment; that the said motion having been overruled on July 29, 1915, the court erred in granting complainant's motion to dismiss the said cross-complaint, said motion being dated November 13, 1915, a copy of which is hereto attached marked "Exhibit D" and made a part of this assignment, to which defendant then and there excepted.

4. Because the court erred in granting the complainant's motion to dismiss the defendant's cross-complaint, said motion being dated

November 13, 1915, a copy of which is hereto attached marked "Exhibit D," exception being then and there taken.

5. Because it appearing that on July 20, 1914, defendant filed his cross-complaint; that same was duly served upon complainant; that thereafter on July 29, 1914, complainant filed a motion to strike said cross-complaint, a copy of which motion is attached hereto marked "Exhibit C" and is made a part of this assignment; that said motion was denied on July 29, 1915; that complainant not having thereafter pleaded to the said cross-complaint, nor secured from the court an enlargement of the time within which to plead, defendant on October 25, 1915, filed a motion for an order for a decree pro confesso on the said cross-complaint, a copy of which motion is hereto attached marked "Exhibit E" and is made a part of this assignment, and which motion the clerk sat down for hearing before the court; that without proceedings in the case and thereafter on November 13, 1915, complainant filed a motion to dismiss said cross-complaint, a copy of which is hereto attached and
84 marked "Exhibit D" and is made a part of this assignment; the court denied the motion for a decree pro confesso and erred in so doing, exception being taken then and there.

6. Because it appearing that on July 20, 1914, defendant filed his cross-complaint; that same was duly served upon complainant; that thereafter on July 29, 1914, complainant filed a motion to strike said cross-complaint, a copy of which motion is attached hereto marked "Exhibit C" and is made a part of this assignment; that said motion was denied on July 29, 1915; that complainant not having thereafter pleaded to the said cross-complaint or having secured from the court an enlargement of the time within which to plead, defendant on October 25, 1915, filed a motion for an order for a decree pro confesso on the said cross-complaint, a copy of which is hereto attached marked "Exhibit E" and is made a part of this assignment; the court granted the complainant's motion to dismiss defendant's cross-complaint and erred in so doing, to which defendant then and there excepted.

7. Because at the trial of the cause, when defendant attempted to prove that the deed of January 14, 1913, Exhibit E for the Complainant, the deed upon which this suit is based, did not contain the contract under which it was agreed that the defendant should purchase the said property, defendant offered in evidence the written contract entered into between himself and his grantor, Lopez Landron, acting for himself and his wife, dated January 13, 1913, said offer having been made after due proof of the signature of the said Landron, wherein it appeared that the defendant agreed to purchase the said property in full satisfaction of a judgment on a mortgage upon the same property in favor of defendant and his law partner, Willis Sweet, and that defendant would take the said property subject to any recorded mortgage incumbrance the recording of which had been made prior to the date of the mortgage made by the said Landron upon the property in favor of defendant and the said Willis Sweet, Esq., that the grantor, Landron, might remain living upon the property for a period of thirty days, during which time

under certain conditions he might repurchase the property, but should he not do so he should pay defendant a rental equal
85 to the interest on the mortgage held by the complainant bank for that length of time. A literal copy of said agreement is attached hereto marked "Exhibit F" and is made a part of this assignment. To which action of the court the defendant then and there excepted.

8. Because at the trial it was shown by the uncontradicted testimony of the complainant's witnesses that one of the mortgages herein sought to foreclose was given by Lopez Landron to secure the payment of the unpaid interest of the mortgage of $4,600 held by complainant upon the property, and which mortgage, the one for $1,700, appears to bear interest at 12 per cent annum, which said amount of $1,700 was itself the unpaid interest on the first mortgage of $4,600, and having been so shown the court erred in finding the interest on the seventeen hundred dollar mortgage for the complainant, together with costs and attorney's fees.

9. Because it appearing that in the amended answer that it was alleged that the persons who appeared as witnessing the execution of the deed of January 14, 1913, Exhibit E for Plaintiff, were the clerk, servants and employees of the Notary Public Damian Monserrat, who drew and authenticated the said deed under which defendant purchased from Lopez Landron the property in question, and that said answer was a sworn answer, the oath not having been waived by complainant; that complainant introduced no evidence to overcome the said allegation; the court erred in not holding in accordance with Section 1998 of the Compiled Statutes of Porto Rico that the said deed was null and void, and in finding for the complainant.

10. Because it having been alleged in defendant's sworn answer, the oath not having been waived, that the Notary Public Damian Monserrat, the notary who drew and authenticated the deed of January 14, 1913, Plaintiff's Exhibit E, the deed upon which this suit is based, was a large stockholder in the said bank at the time of the making and authentication by him of the said deed, and was the attorney-in-fact, attorney-at-law and president of the complainant bank; that the complainant introduced no evidence to overcome the said allegation, and that the court erred in not finding that
86 the said deed was null and void in accordance with Section No. 1998 of the Compiled Statutes of Porto Rico, and in finding for the complainant.

11. Because it appearing from the uncontradicted evidence of the complainant at the hearing and from the record that the said Damian Monserrat, the Notary Public who drew the deed of January 14, 1913, Complainant's Exhibit E, was at the time the attorney for and the president of the complainant bank and a stockholder therein, the court erred in not holding that the said deed was null and void in accordance with the provisions of Section 1998 of the Compiled Statutes of Porto Rico, and in finding for the complainant.

12. Because it appearing that the defendant herein after his cross-complaint filed herein was dismissed, and following the opinion

rendered by the court, filed a suit in this court, same being Equity No. 975, against Rafael Lopez Landron, his wife and the complainant herein, to set aside the deed of January 14, 1913, Exhibit E for the Plaintiff herein; that on the fourth day of January, 1917, upon a hearing in open court, the judge thereof rendered a final decree in the said cause, Equity No. 975, in which it was declared that the deed of January 14, 1913, Exhibit E for the Complainant herein, was null and void; a certified copy by the clerk of said decree is attached hereto and made a part of this assignment marked "Exhibit G." It appearing further that the property described in the deed of January 14, 1913, Exhibit E for Complainant, had by the terms of the decree rendered herein of the date of August 25, 1916, been ordered to be sold on January 6, 1917, defendant herein having filed his bill of review on January 4, 1917; thereafter defendant filed a motion praying the court to suspend the said sale of the property; the court denied said motion and erred in so doing, to which action the defendant then and there excepted.

13. It appearing that on August 25, 1916, the court rendered a decree herein for complainant, that the property described in the complaint was by the decree ordered to be sold on January 6, 1917, that the defendant herein having begun a separate action in this court, Equity No. 975, against the complainant bank, herein Rafael Lopez Landron, to set aside the deed of January 14, 1913, same being Exhibit E for Complainant in this cause, and said bank
87 having filed its answer in the said cause No. 975 in which it disclaimed any connection with or participation in the making of the said deed, and therein prayed that the complaint in said cause to be dismissed as to said bank, and thereupon, complainant appearing further that thereafter the court rendered, a final decree in which it declared that the said deed was null and void; a copy of which decree is hereto attached, certified by the clerk of this court, marked "Exhibit H" and made a part of this assignment; it further appearing that after the rendition of said decree, and on January 4, 1917, defendant herein filed a bill of review praying the court to review and reverse the decree of August 25, 1916, rendered herein, in which, among other things, the nullity of the said deed upon which this action was based was set up, it appearing that thereafter complainants herein filed a motion to dismiss the said bill of review; that the court granted said motion and dismissed the said bill; that it erred in so doing, to which the defendant then and there excepted.

14. Because the court erred in dismissing the bill of review filed herein in holding that one of the defendants Lopez Landron, in Equity No. 975, upon the mere statement of interested counsel for complainant herein, and in the absence of any statement from the attorney of record of the said Landron, or proof, or evidence whatsoever.

15. That the court erred in dismissing the defendant's bill of review filed herein, in holding that it was doubtful if one of the parties, the said Rafael Lopez Landron, was represented by counsel at the time of the rendition of the decree in Equity No. 975 in this court wherein the defendant herein as complainant filed a separate

action against the said Lopez Landron, his wife and the complainant bank herein, and secured a decree declaring the deed of January 14, 1913, to be null and void, same being the deed upon which this suit is based, Exhibit E for the Plaintiff herein, said holding being made in the absence of any proof or evidence whatsoever in support thereof, and in contradiction of the record in said suit.

16. The court erred in dismissing the bill of review filed herein in overruling each and every of the grounds set forth therein upon which same was based.

88 17. The court erred in finding for the complainant upon the whole case because the deed upon which the suit was brought was and is null and void and could not sustain an action thereon, not the decree rendered.

18. The court erred, if the deed of January 14, 1913, Exhibit E for the Plaintiff, were not null and void, in finding for the complainant as to the mortgage of $1,700, with interest thereon, costs and attorney's fees.

19. If the deed, Exhibit E for the Plaintiff, were not void, and if the court did not err in finding for complainant as to the mortgage of $1,700 with interest thereon, costs and attorney's fees, the court erred in finding for the complainant as to the interest on the said mortgage of $1,700, costs and attorney's fees.

20. The court erred in finding for the complainant as to the mortgage of $1,700, interest and attorney's fees for the reason that to so find was against the weight of the evidence.

21. The court erred in holding that there was neither mistake nor fraud in the making of the deed of January 14, 1913, Exhibit E for the Complainant.

Wherefore the defendant prays that the said decree be reversed and that the court of appeals shall render a proper decree on the record.

San Juan, P. R., February 24, 1917.

WILLIS SWEET,
JOSE SAVAGE,
Solicitors for Defendant.

Served with copy of assignment of errors in the above-entitled cause on February 24, 1917.

FRANK ANTONSANTI,
One of the Solicitors for Complainant.

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EXHIBIT A.

Motion to Strike.

Comes now the complainant, the Banco Popular de Economias y Prestamos de San Juan, P. R., and respectfully shows unto this Honorable Court:

That the answer herein filed by the defendant is insufficient in Equity and in Law as a defense to the complaint herein filed and

therefore prays that the said answer be stricken from the record in this cause and that a decree pro confesso be entered herein.

San Juan, P. R., July 28, 1914.

DAMIAN MONSERRAT,
Solicitor for Complainant.

EXHIBIT B.

Motion for Dismissal.

Comes now the plaintiff herein, by its attorneys, Damian Monserrat, Jr., and Joseph Anderson, Jr., and moves the Court that the so-called answer heretofore filed by the defendant be dismissed for the following reasons:

1. That the said answer does not present a defense to the action of the foreclosure which it pretends to answer neither in accordance with the mortgage law and its regulations of Porto Rico nor in fact.

2. That the said answer does not state facts sufficient to constitute a defense either at law or in equity.

3. That same is not drawn in accordance with the provisions of rule 30 of the Supreme Court of the United States for practice in courts of equity of the United States.

Wherefore the plaintiff prays the court that the alleged answer be dismissed.

San Juan, P. R., Nov. 13th, '15.

JOSEPH ANDERSON, JR.,
DAMIAN MONSERRAT, JR.,
Per A.

90 EXHIBIT C.

Motion to Strike.

Comes now the complainant and respectfully shows unto your Honor that the defendant in this case filed herein his answer to the complaint on the 20th day of July, A. D. 1914, and that on the same day and in the same cause the said defendant did file a so-called cross-bill, setting up alleged new facts and praying affirmative relief.

And the complainant herein shows unto your Honor that the said so-called cross-bill is not a proper pleading to be filed in this case by the defendant, because any defense which the defendant should desire to present should be asserted by way of a counter claim and as a part of the answer.

Wherefore the complainant prays that the so-called cross-bill be stricken from the files herein.

San Juan, P. R., July 29th, 1914.

DAMIAN MONSERRAT, JR.,
Attorney for Complainant.

EXHIBIT D.

Motion to Dismiss the Cross-bill.

Now comes the plaintiff herein and moves the Court that the so called cross bill heretofore filed herein be dismissed for the following reasons:

1. That same is not in substance or form a cross bill but contains only such matter as should and might have been set up in the answer if proper defense, in accordance with Rule 30 of the Equity Rules.

2. That if a cross bill, the filing of which is not allowed under the present equity rules, it is defective as to parties inasmuch as Sr. Don Rafael Lopez Landron and his wife are not made parties thereto.

3. That it contains no matter which is a basis for affirmative relief, nor does the prayer ask for affirmative relief nor any fur-
91 ther relief, than could and would be granted on an answer if the so called defenses could be heard and considered in such a case.

Wherefore the plaintiff prays that the said cross bill be dismissed.

San Juan, P. R., Nov. 13th, 1915.

DAMIAN MONSERRAT, JR.,
JOSEPH ANDERSON, JR.,
For Plaintiff.

EXHIBIT E.

Motion for a Decree pro Confesso.

It appearing that on July 20th, 1914, the defendant herein filed his cross bill and that same was duly served upon the above named plaintiff; that thereafter the plaintiff filed a motion to dismiss the said cross complaint, and that on July 28th, 1915, after argument by counsel of the parties herein, the Court denied said motion.

It further appearing that no demurrer, plea, nor answer to the said cross complaint has been filed to date, although same should have been filed before the rule day of the month of September last.

Wherefore the defendant prays the Court for a decree pro confesso upon said cross bill.

San Juan, P. R., October 25th, 1915.

WILLIS SWEET,
Solicitor for Defendant.

EXHIBIT F.

This agreement entered into on this the 13th day of January 1913, in San Juan, P. R., between Rafael Lopez Landron, representing himself, and as attorney in fact for his wife, as the party of the first part, and E. B. Wilcox, as party of the second part, witnesseth:

1. That the party of the first part contracts to sell to the said E. B. Wilcox, the house and lot situated on Park or Train Street in Santurce, San Juan, in which the said party of the first part lives at present with his family, which said house and lot is more particularly

described in a certain mortgage given by the party of the
92 first part and his wife to the members of the law firm, Sweet & Wilcox upon said house and lot, bearing date of June 12th, 1912, being made before Hugh R. Francis, being No. 6 of the Protocol of said Francis; said party of the first part agreeing to sign the deed of sale for himself and wife as soon as the same may be ready for signing.

2. It is further agreed that the price of the said house and lot shall be that amount for which appears in a certain judgment rendered by the Judge of the United States District Court for Porto Rico against the said Rafael Lopez Landron and his wife in favor of the said Willis Sweet and E. B. Wilcox, as members of the late law firm of Sweet & Wilcox, it being understood that the sale and transfer of the above named property is to satisfy the said judgment, and the said E. B. Wilcox agrees to cancel the said judgment upon the signing of the said deed of sale as above provided.

3. It is further agreed that the said Wilcox shall assume the incumbrances now existing against the said property which are duly registered in the Registry of Property, which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet & Wilcox.

4. It is further agreed that any and all expense incident to the preparation of the deed of sale, stamps, etc. shall be paid by the party of the first part.

5. It is further agreed that if within thirty days from the date of this agreement, the party of the first part shall so desire, he may, within the said thirty days, repurchase from the said E. B. Wilcox the above named property by paying for the same the amount named in the judgment referred to given by the Judge of the United States Court, together with the sum of five hundred dollars in addition thereto, it being understood that all expenses necessary in connection with the resale of the said property shall be paid by the said party of the first part, in addition to the amount of the said judgment, and the sum of Five Hundred Dollars just named.

6. It is agreed further that if the party of the first part does not conclude the repurchase of the property within the thirty days
93 named, that he shall vacate the said premises promptly at the conclusion of the said thirty days, it being further understood that during the time mentioned within which the party of the first part may repurchase the said property, that he remain living therein, provided he pay a rental equal in amount to the interest for that time, payable to the Bank of Porto Rico upon the mortgage held by said Bank against said property.

RAFAEL LOPEZ LANDRON,
Party of the First Part.
E. B. WILCOX,
Party of the Second Part.

Witness:
F. C. TIMPSON.

A true copy.
E. B. WILCOX.

Copy compared by Court Reporter with original in his possession.

ARTHUR J. HARVEY,
Court Reporter.

Journal Entry.

February 24, 1917.

Comes the respondent, E. B. Wilcox, and files and petitions for an appeal to the Circuit Court of Appeals for the First Circuit from the final decree of this court entered on August 25, 1916, and also filed his assignment of errors. The appeal prayed for is allowed on condition of the execution of a bond for costs in the sum of $300 (three hundred dollars).

Bond on Appeal.

[Filed February 26, 1917.]

Know all men by these presents: That we, Elias B. Wilcox, as principal and Domingo Soldini and Inocencio Sanchez as sureties, acknowledge ourselves to be jointly indebted to El Banco Popular de Economias y Prestimos de San Juan, P. R., the complainant herein, in the sum of $300.00 conditioned that whereas on the twenty-fifth day of August, 1916, in the District Court of the United States for Porto Rico in the above-entitled cause a decree was
94 rendered against the above-named defendant, and the said defendant having obtained an appeal to the Circuit Court of the United States to reverse the said decree.

Now if the said Elias B. Wilcox shall prosecute his appeal to effect and answer all costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

E. B. WILCOX, *Principal.*
D. SOLDINI,
INOCENCIO SANCHEZ,
Sureties.

Personally appeared before me Domingo Soldini, whom I personally knew, and having been duly sworn deposes and says: I am of age and am a resident of Porto Rico, and that I own real estate in Porto Rico free of incumbrances to the value of more than twice the amount named in this bond.

D. SOLDINI.

Subscribed and sworn to before me on the twenty-sixth day of Feby. 1917.

JOSE L. PENQUEDRO,
Justice of the Peace, Bayamon, P. R.

[Stamp.]

Personally appeared before me Inocencio Sanchez, whom I personally know, and having been duly sworn deposes and says: I am of age and a resident of Porto Rico and that I own real estate in Porto Rico free from all incumbrances to the value of more than twice the amount named in this bond.

INOCENCIO SANCHEZ.

No. 2543.

Subscribed and sworn to before me on this the twenty-sixth day of the month of February, 1917.

JOSE L. PENQUEDRO,
Justice of the Peace at Bayamon, P. R.

[Stamp.]

Approved as of February 24, 1917.
P. J. HAMILTON, *Judge.*

95 Citation on Appeal.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

To El Banco Popular de Economias y Prestamos de San Juan, P. R., *or* Frank Antonsanti *or* Damian Monserrat, *Esqs., Solicitors for the Complainant herein:*

You are notified that in a certain case in equity in the United States District Court for Porto Rico wherein El Banco Popular de Economias y Prestamos de San Juan, P. R., is the complainant and Elias B. Wilcox is the defendant, a suit in equity, No. 946, an appeal has been allowed the defendant therein to the United States Circuit Court of Appeals for the First Circuit. You are hereby cited and admonished to be and appear in the said court at Boston, Mass., not later than the twenty-sixth day of the month of July of the year 1917, to show cause, if any there be, why the decree of August 25, 1916, appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Peter J. Hamilton, Judge of the United States District Court for Porto Rico, this the twenty-sixth day of May, A. D. 1917.

PETER J. HAMILTON, *Judge.*

Received copy May 26, 1917.
FRANK ANTONSANTI,
One of Solicitors for Complainant.

Answer.

[Filed March 13, 1916.]

Comes now the defendant herein and, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill, comes and answers thereto, or so much thereof as he is advised is material to be answered, and says:

I. That defendant has no certain knowledge concerning the allegations made in the introductory paragraph of the bill as to the plaintiff's being a corporation, with residence in Porto Rico,
96 and therefore demands proof thereof, but as to the allegation of defendant's citizenship and residence, defendant admits said allegations.

II. That defendant has no certain knowledge of the existence of the mortgage made mention of in paragraphs one and two of the bill of complaint, nor as to whether same was recorded and as to whether interest due and unpaid on same, nor as to whether said mortgage is matured, or cancelled, therefore plaintiff denies each and every allegation made in said paragraphs one and two, and demands proof thereof.

III. Likewise defendant has no certain knowledge of an alleged mortgage for the sum of $1,700 mentioned in paragraphs three and four of the bill of complaint, nor that same has matured and due, nor whether same has been cancelled wholly or in part, and therefore denies each and every allegation of paragraphs three and four, and demands proof thereof.

IV. Defendant says that he has no certain knowledge of the allegations contained in paragraph five of the bill of complaint; that he therefore denies same, and demands proof thereof.

V. Defendant further says, answering the allegations made in paragraph sixth of the complaint, that it is admitted that the property mentioned was sold to defendant on the date therein stated by Rafael Lopez Landron and wife, and that the said deed is recorded as therein stated, and also denies the allegations that defendant acknowledged his liability for any amounts due and chargeable against the said property, except as he took same subject to indebtedness legal by chargeable against in the manner, under the circumstances and to the extent hereinafter stated, in a separate defence appearing later herein, and says that, except for the admissions herein made above, defendant denies each and all of the allegations contained in the said complaint.

VI. And defendant denies each and every allegation made and contained in the seventh paragraph of the bill of complaint, and all allegations not specifically denied are now denied, and proof thereof demanded.

And as a separate and further defense defendant alleges and says:

I. That some three years ago the defendant, together with
97 Willis Sweet, under the firm name of Sweet & Wilcox, attorneys-at-law, rendered certain legal services to Rafael Lopez

Landron for the stipulated fee of $1,500, which was never paid except a small part thereof, although in a settlement which the said Landron made of the litigation in question, without the knowledge of his attorneys, Sweet & Wilcox, the said Landron among other concessions demanded to be paid the sum of one thousand dollars, with which he was to pay his attorney's fee, which amount was paid him under said statement, but which was never wholly nor in part paid to his attorneys, Sweet & Wilcox. After making many demands upon the said Landron for the payment of same, the said law firm of Sweet & Wilcox brought action for the amount due them in this court and secured herein a judgment for something over $1,100 and costs. Later, because of the importunities of the said Lopez Landron, they refrained from executing their judgment, and accepted the proposition made by the said Landron to make in their favor eleven promissory notes of the value of $100 each and one for sixty-five dollars, the first of the series payable at the end of the first month, the second at the end of the second month and so on through until all were paid, with the agreement that should there be a default in the payment of any of the said notes that said default would mature the entire obligations; and to secure the payment of said notes together with costs and attorney's fees in case of a suit brought to collect same, or any part thereof remain unpaid, the said Landron and wife gave Sweet & Wilcox a mortgage upon the property described in paragraph five of the bill of complaint, which defendant says was duly recorded in the Registry of Property of San Juan on July 10, 1912, and that if it be true, as complainants allege, they held a mortgage on said property for $4,600 and recorded on August 3, 1909, the said mortgage in favor of Sweet & Wilcox was the second mortgage on said property.

II. Defendant further says that the said Lopez Landron never paid any of said notes, nor any part thereof, and that after many efforts to collect same the said Sweet & Wilcox brought a suit in this court to foreclose their said mortgage, which was duly
98 decreed by this court, judgment being rendered for plaintiffs in the amount of the mortgage together with costs, interest and attorney's fees.

III. That, as Sweet & Wilcox were about to execute the decree of foreclosure aforesaid on said property, Mr. Damian Monserrat y Simo, then as now, as defendant was informed and then and now believes, the president of the plaintiff bank, its attorney and a large stockholder therein, came to defendant claiming that the bank held a prior mortgage to the one held by Sweet & Wilcox of $4,600 on the said property, and stated further that he was an old friend of the said Landron; that he would be very sorry to see his property sold under mortgage, necessitating the publication of notices of sale in the public press; that same would very much injure and humiliate him; that it was painful to see one lawyer sued by his brother lawyers, and that in order to prevent all this he would suggest to Landron that he transfer to Sweet & Wilcox the said property in satisfaction of their mortgage judgment; that it would appear as a sale and save his friend the damage and humiliation of a public

auction sale of his property; that later the same could be disposed of by private sale for a sufficient sum to satisfy the mortgage of the bank and referred to and that of Sweet & Wilcox, as said property was easily worth sufficient to do this, and that the bank would engage itself to find a purchaser; that this would be easy, as for certain reasons defendant could better sell the property than could Lopez Landron.

IV. Defendant further says that later Messrs. Monserrat, Lopez Landron, acting for himself and his wife, and defendant met to consider the matter, and it was agreed that defendant would take over the ownership of the property in question under the representations made and in the way set forth in the previous paragraph of this answer subject to all mortgage indebtedness recorded against the property prior to the date of the registration of the above-named mortgage held by Sweet & Wilcox, that is to say, prior to July 10, 1912; that it would appear in the deed of transfer that the purchase price would be the amount of their mortgage held by Sweet & Wilcox against Lopez Landron and wife obtained in the foreclosure proceedings above mentioned and that defend-
99 ant agreed, in consideration of the transfer so made, to procure the filing of a satisfaction of the said judgment standing in this court against Landron and wife, and to permit the cancellation of the mortgage of Sweet & Wilcox recorded on the books of the Registrar of Property on July 10, 1912. Defendant says that under the agreement above stated, of which he knew, Mr. Simon Monserrat y Simo was instructed to have the deed of transfer in accordance with the said agreement prepared.

V. Defendant further says that thereafter he was notified to come to the office of Mr. Simon Monserrat y Simo; that the deed of transfer was ready to be signed and that upon his arrival he was handed a lengthy document written in the Spanish language; that defendant was pressed for time and desired to leave the matter for another day, but being assured by Mr. Monserrat that the document was drawn in accordance with the agreement above stated and having every confidence in the statement, defendant signed same without informing himself of its contents except through the statement of Mr. Monserrat, upon which he relied. And defendant further says that he was misled and deceived by the statement that the said deed handed him to sign contained the agreement above stated between himself and Lopez Landron, and that in signing same he did so in the absolute belief that the said deed was drawn in compliance with said agreement.

VI. Defendant says that only after considerable time did he learn that mention was made in the said deed of a second mortgage of $1,700 held by the bank from Landron against the said property made so it is alleged on December 3, 1912, but not recorded until January 28, 1913, after the transfer of the property from Landron to defendant, which bears the date of January 14, 1913, and in which transfer it appears that defendant took the said property subject to both mortgages instead of subject to the first mortgage of $4,600, defendant having agreed to take over said property subject

to mortgage indebtedness duly recorded against said property prior to July 10, 1912, same being the date of the registration of the mortgage held by Sweet & Wilcox as above stated, and which defendant later permitted to be cancelled in the belief that he held
100 the said property in his name clear of any incumbrances save the plaintiff's first mortgage of $4,600.

VII. And as a further and separate defence defendant says that the said deed of transfer whereby the said Lopez Landron and wife transferred the said property to defendant was drawn by Simon Monserrat y Simo, at the time and now a Notary Public; that the said Notary Monserrat was at the time of drawing same, and since, the defendant is informed and believes, the president of the plaintiff's bank, its attorney-at-law and its attorney-in-fact, and a large stockholder therein, and that the said deed of transfer is null and void because of these facts stated in this paragraph under the provisions of Section 20 of the law "Concerning Notaries" in force at all times mentioned in this complaint, the same being Section 1998 of the Revised Statutes and Codes of Porto Rico.

VIII. And as a further separate defence defendant alleges that the deed of January 14, 1913, by which Lopez Landron and wife transferred the property in question to defendant is null and void because, defendant is informed and believes, and states upon information and belief, that the witnesses who acted as such to the signing of the document in question were at the time servants, clerks and employees of the said Notary Simon Monserrat y Simo, who acted as such in drawing and authorizing the said deed.

Wherefore, thus having full answer made, defendant respectfully prays the court as follows:—

That the deed dated January 14, 1913, by which the property described in paragraph V of the bill was transferred to the defendant be declared to be null and void; that the said property be that of Lopez Landron and wife; that the mortgage held by Sweet & Wilcox shall be declared to be in full force and effect and recorded at its proper book and page in the book of the Registry of Property of San Juan as of the date of July 12, 1912; that the judgment obtained thereon by Sweet & Wilcox in this court be held to be in full force and effect, and that the three mortgages existing against the said property, to wit, the one held by plaintiff for $4,600 recorded on August 3, 1909, that held by Sweet & Wilcox rerorded July 10, 1912, together with their judgment thereon
101 and the alleged mortgage of plaintiff for $1,700 recorded January 28, 1913, be held to their order of preference, according to the order of their date of registration, to wit, the dates above named respectively; that the plaintiff be adjudged to pay the costs and expenses of this suit so wrongfully brought, and for such other and further relief as in equity and good conscience this Honorable Court of Equity may deem defendant entitled.

WILLIS SWEET,
By E. B. W.,
Attorney for Defendant.

Personally appeared before me the defendant, E. B. Wilcox, and having been duly sworn, deposes and says that he has read the answer herein, and that all those things therein he knows to be true except those stated upon information and belief and as to these he believes them to be true.

E. B. WILCOX,
Defendant.

Subscribed and sworn to before me this thirteenth day of March, A. D. 1916.

ANTONIO AGUAYO,
Clerk District Court U. S. for Porto Rico,
[SEAL.] By L. A. GROSS, *Deputy Clerk.*

Journal Entry.

[July 10, 1917.]

Upon motion of the respondent herein and good cause shown the court extends the time within which to file the Transcript of Record in the United States Circuit Court of Appeals for the First Circuit thirty days from the seventeenth day of July, 1917.

Order.

August 10, 1917.

Upon motion of the defendant and good cause shown, it is ordered that the time within which defendant may file his
102 transcript of Record on appeal is enlarged fifteen (15) days from the sixteenth day of August, 1917.

San Juan, P. R., August 10, 1917.

PETER J. HAMILTON, *Judge.*

Journal Entry.

August 18, 1917.

Upon motion of Jose R. F. Savage, attorney for defendant, the time to file the Transcript of the Record in the Circuit Court of Appeals in Boston is extended ten days from the thirty-first day of August, 1917.

Hon. Harvey M. Hutchison, Associate Justice Shpreme Court of Porto Rico, San Juan, Porto Rico.

SIR: Pursuant to the provisions of Section 41 of the act of March 2, 1917, entitled "An Act to provide a civil government for Porto Rico, and for other purposes", I, the President of the United States, hereby designate you to serve in the United States District Court for the District of Porto Rico during the period which Judge Peter

J. Hamilton shall be absent from the District of Porto Rico upon leave as now contemplated, and you are hereby authorized and empowered to perform the duties of said office and to sign all necessary papers and records as the acting judge of said court, without extra compensation.

Dated Washington, D. C., July 10, 1917.

WOODROW WILSON,
President of the United States.

Order of Court.

September 5, 1917.

It appearing to the court that the time within which the record on appeal from the final decree of foreclosure herein should be filed in the United States Circuit Court of Appeals for the First Circuit is about to expire, and that owing to additional work in the office of the clerk of this court incident to naturalization proceedings the completion of the said record within the time fixed by law and
103–4 by prior extensions granted by this court is physically impossible; it is hereby

Ordered that the time for filing the record on appeal from the final decree of foreclosure herein in the United States Circuit Court of Appeals for the First Circuit be and the same hereby is extended twenty days from the expiration of the extension last hereinbefore granted.

San Juan, P. R., September 5, 1917.

H. M. HUTCHISON,
Acting Judge.

Certificate.

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true copy of the papers and proceedings in the case entitled therein on file and of record in my office, as called for in the præcipe for Transcript of Record.

Witness my official signature and the seal of said court, at San Juan, in said district, this twenty-second day of September, A. D. 1917, and in the 142d year of the Independence of the United States of America.

[SEAL.] ANTONIO AGUAYO, *Clerk.*

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Antonio Aguayo, Clerk of the District Court of the United States for the District of Porto Rico, do hereby certify that by an oversight a journal entry dated August 18, 1917, enlarging the time to file the transcript in the Circuit Court of Appeals for the First Circuit was

omitted when first mailed to the appellate court, as also the seal to the certificate to said transcript; which omissions I have this day corrected.

In witness whereof I hereunto set my hand and affix the seal of said court at San Juan in said district this sixth day of October, A. D. 1917, and in the 142d year of the Independence of the United States of America.

[SEAL.] ANTONIO AGUAYO, *Clerk.*

105–6 United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1311.

ELIAS B. WILCOX, Defendant, Appellant,

v.

EL BANCO POPULAR DE ECONOMÍAS Y PRÈSTAMOS DE SAN JUAN, PORTO RICO, Complainant, Appellee.

Order of Court.

October 13, 1917.

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Saturday, October 13, 1917.

FREDERIC DODGE,
Circuit Judge.

107 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1311.

ELIAS B. WILCOX, Defendant-Appellant

versus

EL BANCO POPULAR DE ECONOMÍAS Y PRÈSTAMOS IE SAN JUAN, P. R., Plaintiff-Appellee.

Stipulation.

Now come the Defendant-Appellant and the Plaintif-Appellee by their respective attorneys, and, subject to the approval of the Court, do hereby stipulate, consent and agree that the copies hereto attached at Plaintiff's Exhibit "A," Plaintiff's Exhibit "B," and the opinion of the District Court of the United States for the District of Porto Rico, dated August 25th, 1916, be printed as part of the transcript of record in the above entitled cause, the said Exhibits A and B having been a

part of the original bill of complaint herein, and the Clerk of the Court having failed to include the same in the transcript certified by him to this Court; and it is further stipulated, consented and agreed that the copies of the said exhibits hereto attached are true and correct translations of the original exhibits on file in the District Court of the United States for the District of Porto Rico. The opinion of the District Court, hereto attached, is the opinion handed down upon entering the final decree from which the appeal herein was taken, and the Clerk of the District Court failed to annex the same to the record as required by Rule 14 of this Circuit.

It is further stipulated and agreed that Exhibit "E" for Defendant, as the same appears beginning at the bottom of page 37 of the printed record herein, is a true and correct copy of the deed
108 attached to the original bill of complaint herein as Exhibit "C," no copy of which was made by the Clerk of the said District Court as a part of the said original bill.

San Juan, P. R., September 26th, 1918.

JOSÉ R. F. SAVAGE,
Attorney for Appellant.
FRANK ANTONSANTI,
Attorney for Appellee.

EXHIBIT "A" FOR PLAINTIFF.

Damian Monserrat, Lawyer & Notary, San Juan, Porto Rico.

Corrected Copy.

Number 494.—In the city of San Juan, Capital of Porto Rico, on the 29th of July 1909. Before me, Damian Monserrat y Simó, Lawyer, notary public, with vicinity and residence in the city and office at number 17 Cruz St. appear for the purpose of executing a contract of loan with voluntary mortgage.

As borrower, Don Rafael López Landrón, 45 years of age, married, lawyer and resident of this city, in his own right and on behalf of his lawful wife Doña Ana María Gutierrez e Igaravídez, 31 years of age, property owner of this vicinity, as per power of attorney granted him with powers to borrow sums of money in cash secured by immovable property, according to deed of July 18th, 1904, executed before the notary Don Juan Hernández López, under number 13.

As lender, the Banco Popular de Economías y Préstamos, established in this city; and in its name, and representation in this case, its Asst. Director, Don Enrique Cerecedo y Millan, 39 years of age, married, merchant of this vicinity.

The parties hereto are in my judgment legally qualified for executing this deed, and set forth:

First. Don Rafael López Landrón is the owner of an urban property or house with lot situated on Park street or Electric Railway, St. North Section of Santurce, a ward of this city.

It is a frame house, two stories, covered with zinc, 15 meters in front by 22 meters deep; the lot on the front, East, facing said street

measures 41 meters; on the right entering, north, bounding with another lot of Don Rafael López Landrón, 51 meters 50 centi-
109 meters; on the rear, west, bounding with lands of the said López Landrón, formerly Doña Belén Requena, 42 meters 50 centimeters.

Title.

This property according to deed of material division of another one, executed before the Notary Don Juan de Guzmán Benítez, on the 8th of June 1908, under number 67, comes out of the one which Don Rafael López Landrón purchased from Don Guillermo Igaravidez Landrón, by deed of July 18th, 1904, before the Notary Don Juan Hernández López, inscribed in the Registry of Property of this city at folio 241, volume 49 of the same property number 2115, fourth inscription.

Liens.—It is free from incumbrance according to the statement of the owner.

Second. The parties hereto go on setting forth that the Banco Popular de Economías y Préstamos made a loan of Four thousand six hundred dollars to Don Rafael López Landrón, for the period of time, interest and covenants stipulated in the following clauses:

First. Don Rafael López Landrón acknowledged having received from the Banco Popular de Economías y Préstamos the four thousand six hundred dollars of principal of the loan, in cash. This confession he ratifies after being advised by me, the Notary, that it will go against him, according to articles 1186 and 1200 of the Civil Code.

Second. This loan is made for the term of one year, which expires on the 29th of July 1910.

Third. It has been agreed that it shall bear interest at the rate of one per cent monthly which the borrower agrees to pay every four months in advance to the lender, the Bank, at its office through a simple receipt. If default be made in the payment of a four months' installment of interest, the obligation shall be considered due and the Bank shall have the right to bring suit for the recovery of principal and interest.

Fourth. Mr. López Landrón shall take fire insurance policies on the above described property for a sufficient sum to cover the amount of the loan, and binds himself to keep said insurance in force paying the premiums thereon, while the effects of this contract are in force.

Fifth. The borrower, Mr. López Landrón shall pay the expenses for drawing up this deed, its copy and inscription, its cancel-
110 lation in due course of time, and shall pay whatever taxes may be imposed upon the capital of interest on this loan.

Sixth. To secure the payment of the four thousand six hundred dollars of principal, interest thereon at one per cent monthly and an additional credit of five hundred dollars for costs, disbursements and attorney's fees in case of judicial proceedings, Don Rafael López Landrón, in his own right and as attorney in fact for his wife Doña Ana María Gutiérrez e Igaravidez, constitutes a mortgage upon the

urban property above described, and the Banco Popular de Economías y Préstamos accepts the real mortgage right constituted in its favor.

There have been made the proper legal warnings relative to this contract.

They so executed in the presence of the witnesses resident of this capital Don Honorato Andrés and Don Francisco Socorro.

All have been advised as to their right to read this deed each by himself, which they did, I having read it to the witnesses who had waived that right; the former state that it is satisfactory to them and they all sign before me the notary who give faith as to my knowledge of the contracting parties as well as to all other matters affirmed or recited in this public instrument. Rafael López Landrón.—Enrique Cerecedo.—H. Andrés.—Franco Soriano.—Signed: Damián Monserrat.—There is an internal revenue stamp of one dollar cancelled by the seal of the notary.

This is a first copy for the creditor Bank, of deed number 494 filed in the general protocol of my notarial office for the corresponding year which I issue on two sheets of paper of my use.

The foregoing is a true copy of the original of which I certify in the city of San Juan, Puerto Rico, on the same day, month and year of its execution. Signed: Damian Monserrat, Lawyer & Notary.

Presented at 8.7..... Number 386.—Folio 115.—Volume 33, Journal.—San Juan, P. R., August 3rd, 1909.—The Registrar José Benedicto.

Fees 50 cts. No. 1 of the tariff. A stamp of that value is cancelled.

Presented at 3.15 p. m. Entry No. 71, Folio 15, Volume 34.—San Juan, P. R., December 1907.—Fees 0.50 The Registrar: Belaval.

There are three stamps of fifty cents each, cancelled, one by the notary and two by the Registrar. Seal of the Notary.

Presented at 8.40 a. m. Entry No. 1256, Folio 262, Vol-
111 ume 34 Journal.—San Juan, P. R., May 13th, 1910.—Fees 0.50.—The Registrer. B.....

There is a fifty cent stamp cancelled and a rubber stamp which reads: Registry of Property of San Juan.—Section 1.—The foregoing document has been recorded, having other documents before me, the property consisting of two thousand and ninety four square meters five centimeters, being the balance thereof, according to the Registry, folio 217, over, volume 58, of this city, property 2115 duplicate, tenth inscription.—San Juan, Porto Rico, May 19th, 1910. The Registrar: José S. Belaval.

Cancelled nine stamps of one dollar each. Fees No. 5 of the tariff; and the 50 cents stamp provided for by the Political Code.

San Juan, P. R., May 19th, 1910.—The Registrar: Belaval.—There are nine stamps of Internal Revenue to the value of one dollar each and three of fifty cents cancelled.

On each of the folios there appear the seal of the Notary and a signature.

EXHIBIT "B" FOR PLAINTIFF.

Damian Monserrat, Lawyer & Notary, San Juan, Porto Rico.

Corrected Copy.

Number 91.

In the city of San Juan, Porto Rico, of which I am a neighbor and resident, on the 3rd of December, 1912.

Before Me

Damian Monserrat y Suro, Notary Public and Lawyer, appear for the purpose of carrying out a contract of loan with mortgage. As borrower, Don Rafael López Landrón, 48 years of age, married lawyer and resident of this city. In his own right, and in representation of his wife Doña Ana María Gutiérrez e Igaravidez, 33 years of age, property owner and resident of this city, who has granted him power of attorney and consent to sell and incumber real property belonging to the conjugal partnership, by deed of October 27, 1909 executed before my colleague Don Damian Monserrat y Simó.

As lender, the Banco Popular de Economías y Préstamos, established in this city, and in representation thereof its Sub-Di-
112 rector Don Enrique Cerecedo y Millan, 42 years of age, married, merchant and resident of this city.

The parties hereto have in my judgment the legal capacity necessary for executing this instrument, wherefore they set forth:

First. Don Rafael López Landrón is the owner of an urban property or house with lot situated on Park St. or electric railway St. North section in the ward of Santurce of this city. The house is a frame house, two stories, covered with zinc; measuring 15 meters in front by 22 meters deep; the lot measures 41 meters in front, facing the street on the East; on the right entering on the north, bounding with another lot of Don Rafael López Landrón; it measures 51 meters 50 centimeters; on the left South, bounding also with lands of Don Rafael López Landrón, 51 meters 50 centimeters; and on the rear West bounding with lands of Don Rafael López Landrón, formerly Doña Belén Requena, 42 meters and 50 centimeters.

Second. Title.—This property according to material division made of another one, by deed of June 8th, 1908, before the Notary Don Juan de Guzmán Benítez, proceeds from that which Don Rafael López Landrón purchased from Don Guillermo Igaravidez Landrón, according to deed of July 18th, 1904, executed before the notary Don Juan Hernández López, and recorded in the Registry of Property of this city First Section, at folio 241, volume 49 of the Capital, property 2115 fourth inscription.

Third. Liens.—It is subject to a mortgage to secure the payment of four thousand six hundred dollars to the Banco Popular de Economías y Préstamos, interest thereon at one per cent monthly and

an additional sum of five hundred dollars for reimbursement in case of litigation. This mortgage was constituted by deed of July 29th, before the Notary Don Damian Monserrat y Simó, and inscribed in said registry at folio 217, volume 58 of the Capital, property hereinbefore mentioned, 10th inscription.

Fourth. Loan.—The parties hereto set forth that the Banco Popular de Economias y Prestamos has lent to Don Rafael Lopez Landrón, the sum of One thousand seven hundred dollars for the term of one year at one per cent monthly, in the manner and under the conditions stipulated in the following clauses:

First. Don Rafael Lopez Landron, acknowledges having received from the Banco Popular de Economias y Prestamos a loan of One thousand seven hundred dollars in cash.

113 This acknowled-ment he ratifies after having been advised by me, the Notary, that it will constitute proof against him.

Second. The term of one year for this loan shall expire on the 3rd of December 1913.

Third. The interest thereon at the rate of one per cent monthly shall be paid by the borrower to the Bank, in advance every four months.

Default in the payment of one in-tallment shall cause the debt to be constituted due, and the Bank may demand immediate payment of principal and interest, by collecting the mortgage which is to be constituted in its favor.

Fourth. Don Rafael Lopez Landron shall deposit in the Bank, endorsed to its favor, the fire insurance policy on the said property and shall pay the premiums thereon while the effects of this contract are in force.

Fifth. The debtor, Mr. Lopez Landron shall pay the expenses for the drawing up of this deed, copy thereof and its inscription in the Registry, cancellation of the mortgage when due, and payment of whatever taxes may be imposed upon the principal or interest under the loan.

Sixth. Don Rafael Lopez Landron does hereby mortgage in favor of the Banco Popular de Economias y Prestamos the above described property to secure the payment of the one thousand seven hundred dollars of principal, interest thereon at one per cent monthly and in addition thereto expenditures, costs and attorney's fees in case of a judicial claim, up to the sum of Two hundred dollars, and the right constituted in its favor.

The reservation and proper legal warnings pertinent to this contract have been made.

They so granted in the presence of the witnesses residents of this city Don Honorato Andres and Don Francisco Soriano.

The contracting parties read this deed and find it satisfactory, I read it to the witnesses who waived their right to read it themselves, and all sign before me of which, I, the Notary give faith, as well as to my knowledge of the parties and all matters affirmed or recited in this public instrument, which I sign, mark and rubricate. Rafael Lopez Landron.—Enrique Cerecedo.—H. Andres.—Francisco Soriano.—Signed:—Damian Monserrat, J. There is an internal

revenue stamp of one dollar, cancelled by the seal of the Notary.—
It is a first copy for the creditor Bank, of deed number 91,
114 filed in the General Protocol of my Notarial office for the corresponding year which I issue on two sheets of paper of my use.

The foregoing is a true and correct copy of the original of which I give faith in the city of San Juan de Puerto Rico, on the same day, month and year of its execution.—Damian Monserrat, *Jr.*, Lawyer & Notary.

Presented at 3.15 p. m. Entry No. 51—folio 11—volume 40, San Juan, P. R., January 28th, 1913.—Fees 50 cts.—The Registrar: Belaval.

The foregoing document was recorded having before me the power of attorney, at folio 72, volume 24, of Santurce North, property number 2115, triplicate, 12th inscription, it being understood that this inscription covers whatever may be the balance of the superficial area which it may appear to have according to the registry, and the defect is noted of not having given said superficial area. San Juan, Porto Rico, February 4th, 1913.—The Registral: José S. Belaval, Cancelled two stamps of $3, No. 5 of the tariff and one of 50 cents, as provided for by the Political Code.—San Juan Feb. 4th, 1913.—Belaval. There are three stamps of 50 cents and two of three dollars.—cancelled.

A rubber stamp from the Registry, reading as follows: Registry of Property, San Juan, Section 1.—

On each of the folios of the copy there is the seal of the Notary reading as follows: Damian Monserrat Suro, Lawyer & Notary. San Juan, P. R.

Opinion of District Court.

August 26, 1916.

Damian Monserrat, Jr., and Frank Antonsanti for Complainant.
Willis Sweet for Defendant.

HAMILTON, *J.*:

This is a preceeding for foreclosure of mortgages. It was begun in the local District Court at San Juan and removed by the defendant, an American, to the Federal Court, where a reformed bill of complaint was filed June 9, 1914. No question is raised as to the first mortgage by Rafael López Landrón and wife upon the property
dated July 29, 1909, for $4,600.00 principal. The real con-
115 tention is as to whether a second mortgage by the same parties also to the plaintiff dated December 3, 1912, for $1,700.00 is binding upon defendant Wilcox. The second mortgage in question is registered January 28, 1913, in the registry of property of San Juan, section 1, at folio 72, volume 24 Santurce, property No. 2115, triplicate, 10th inscription. The question in the case arises from the fact that Rafael López Landrón and wife made on January 14, 1913, before the Notary Public Damian Monserrat at San Juan, the

same notary before whom were executed the two mortgages, a deed whereby the grantors sold to said Wilcox the same property, a house and lot on Park Street in Santurce, San Juan. This deed contains a direct assumption by the defendant of registered incumbrances on the property; but the contention of defendant is that the second mortgage in question had not been registered at the time and was not within the contemplation of the parties.

1. A good deal of evidence was taken pro and con, that of the plaintiff tending to show that not only was the defendant informed of the existence of this second mortgage but that he distinctly assumed it. On the other hand, the defendant testifies himself and has other testimony to the effect that he was not informed of the second mortgage and whatever recitals are contained in the deed to him were not read by him, as he trusted the notary. The case therefore is not without difficulties upon the question of fact. The conclusion of the Court however is that the deeds are the primary source of evidence in the transaction, as in all similar transactions, and must control unless the evidence is very persuasive that there was a mistake or fraud of some kind, affecting the plaintiff bank. The Court cannot say that it is convinced by a preponderance of evidence that such was the case and must therefore be guided by the documents themselves. It would seem that the plaintiff is entitled to recover. Sentencia Sup. Ct. Spain, Sept. 29, 1897.

2. The original suit was brought under the local Mortgage Law, whose proceedings are in great detail. The question arises whether the proceedings when transferred into the Federal Court on its equity side is to follow these details. It has been decided in Porto Rico that there are two remedies for foreclosure, the first being under the proceedings set out in the Mortgage Law which is summary in its nature, and second a plenary declaratory action following the usual course of proceedings under the Code of Civil Procedure. When a suit reaches the Federal Court however and
116 becomes in form and in nature a bill in equity, there is a third procedure allowed. There is no question that a court of equity has jurisdiction to foreclose a mortgage, the theory being in equity that time is not of the essence of the contract and that the defendant should be allowed a time to redeem before the property is sold. Under this a decree is entered fixing a reasonable time within which the defendant may pay the debt and directing that *if* he does not comply the property shall be sold by the master after due advertisement. In the case at bar there would seem to be no necessity for the appointment of a special master and the Clerk will do what is necessary.

A decree will therefore be entered fixing the amount of the debt as shown by the evidence, permitting redemption within ninety days, and directing a sale of the property to satisfy the debt after the expiration of that period.

It is so ordered.

San Juan, P. R., August 25, 1916.

PETER J. HAMILTON, *Judge.*

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true and correct copy of the original opinion in the above entitled matter on file and of record in this office under date of August 25, 1916.

Witness my official signature and the seal of said Court at San Juan in said district this 11th day of March A. D. 1918 and in the 142 year of the independence of the United States of America.

[SEAL.] ANTONIO AGUAYO, *Clerk.*

117 [U. S. C. C. A., First Circuit.—No. 1311.]

EXHIBITS G AND H.

(Printed Pursuant to Leave of Court Granted on the Argument.)

NOTE.—These Exhibits are one and the same, being final decree in Equity Suit No. 975. They are referred to in assignments 12 (p. 86) and 13 (p. 87). The date of this decree is erroneously given in assignment 12 as "the fourth day of January, 1917." This error was doubtless due to confusion of the true date of this decree, December 20, 1916, with the date of filing the bill of review which was January 4, 1917. The original certified copy of the exhibit has been filed with the Clerk of this Court.

In the District Court of the United States for Porto Rico.

Equity. No. 975.

ELIAS B. WILCOX, Complainant,

vs.

RAFAEL LOPEZ LANDRON and His Wife, ANA MARIA GUTIERREZ E IGARRAVIREZ, and The Banco Popular de Economias y Prestamos de San Juan, P. R., Defendants.

Decree.

It appearing to the court that the bill in the above entitled cause having been filed in this court on the 30th day of the month
118 of June, 1916 and that subpœnas having been duly issued and served on all the defendants named herein, and that the time fixed by law and extended by the court to answer or further plead having expired without the defendants Rafael Lopez Landron and his wife Ana Maria Gutierrez or either of them having an-

swered or further pleaded, that the plaintiff, on the 7th day of the month of September, 1916, caused to be entered on the record an order to take the bill as confessed as to the said defendants, Rafael Lopez Landron and his wife Ana Maria Gutierrez.

It further appearing that a motion having been filed in this court for a decree of judgment pro confesso, as against the said last named defendants, more than thirty days having elapsed since the entry of the order pro confesso, and the said motion having been duly set down for hearing, same was heard in open court and granted. It is hereby ordered, adjudged and decreed, that the plaintiff have judgment against the said Rafael Lopez Landron and his wife Ana Maria Gutierrez e Igarraverez as prayed in the said bill of complaint, or amendments thereto, or as amended; and that the deed of sale made by the said defendants wherein they sold to the plaintiff herein the following described house and lot situated in the city of San Juan, P. R. to wit:

"A house and lot situated on Park street (calle del Parque o tren Electrico) in the northern section of the barrio of Santurce this city (San Juan). The house is made of wood, consists of two stories and is roofed with zinc, measuring fifteen meters in length by thirty two in width (fondo) and the lot measures on the East 41 meters in length; on the North and adjoining another plot of land belonging to Rafael Lopez Landron, formerly Belen Requenta, 42 meters and 50 centimeters."

The said deed of sale having been made before Damian Monserrate, a Notary Public, on the 14th day of January, 1913, number 16 of his protocol and recorded in the Registry of Property at folio 73, Vol. 24 of Santurce, property number 2115, is null and void.

PETER J. HAMILTON, *Judge*.

119-20 DISTRICT OF PORTO RICO,
City of San Juan, ss:

San Juan, P. R., December —, 1916.

I, Antonio Aguayo, Clerk of the District Court of the U. S. for P. R. do hereby certify that the foregoing is a true and correct copy of the original Decree in the above entitled case on file and of record in this office under date of Dec. 20, 1916.

Witness my official signature and the seal of said Court at San Juan in said district this 11th day of March A. D. 1918 and in the 142 year of the Independence of the United States of America.

[SEAL.] (Signed) ANTONIO AGUAYO, *Clerk*.

121-22 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1311.

ELIAS B. WILCOX, Defendant, Apellant,

v.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, PORTO RICO, Plaintiff, Appellee.

Order of Court.

November 6, 1918.

Upon stipulation of counsel, It is ordered that Plaintiff's Exhibits A and B and the opinion of the District Court of August 26, 1915, be added to the printed record.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Order of Court.

November 6, 1918.

Leave is granted appellant to file printed copies of exhibits G and H omitted from the transcript of record.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

123 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1311.

ELIAS B. WILCOX, Defendant, Appellant,

v.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., Plaintiff, Appellee.

Appeal from the District Court of the United States for the District of Porto Rico.

Before Bingham, Johnson, and Anderson, JJ.

Opinion of the Court.

December 3, 1918.

BINGHAM, *J.*:

This is an appeal from a decree in the United States District Court for Porto Rico in an equity suit brought by El Banco Popular against Elias B. Wilcox, June 9, 1914, to foreclose certain mortgages. In the bill, after setting out the citizenship and residence of the respective parties, it is alleged:

(1) That on July 29, 1909, one Landron and wife executed a mortgage before Damian Monserrat, Senior, as Notary Public, in favor of the bank to secure the sum of $4,600 with interest at one per cent. per month for the term of one year; that the interest was to be paid in advance every four months and, in case of failure to pay the same as agreed, the mortgage should be considered overdue. The mortgagor was to keep the property insured for the amount of the mort-
124 gage and, in case it became necessary to institute judicial proceedings to enforce collection, the mortgagor was to be liable for an additional sum of $500 to cover costs, disbursements and attorney's fees; that the mortgage had not been paid in whole or in part and that interest was due thereon from August 2, 1913, to March 3, 1914, amounting to $322.

(2) That on December 3, 1912, said Landron and wife executed another mortgage before Damian Monserrat, Senior (Junior), as Notary Public, to secure the sum of $1,700 and interest at one per cent. per month for the term of one year; that the interest was to be paid in advance every four months and in case of failure so to do the mortgage was to become due; that the mortgagor was to keep the property insured for the amount of the mortgage debt, which he failed to do; and that the bank had been obliged to pay for insurance premiums the sum of $108.68; that an additional sum of $200 was provided for to pay costs and attorney's fees in case of foreclosure; that said mortgage had not been paid; and that interest was due

thereon from August 3, 1913, to March 3, 1914, in the sum of $119.

(3) That both mortgages were upon the same property, consisting of a house and lot situated in the District of Santurce, San Juan.

(4) That on January 14, 1913, Landron and wife conveyed said house and lot by deed executed before Damian Monserrat, Senior, as Notary Public, to the defendant Wilcox, who therein assumed and agreed to pay the mortgages above stated.

(5) That there is now due and owing from the defendant to the bank on said mortgages, the sum of $7,549.68; that no part of said sum or the interest thereon since March 3, 1914, had been paid, though the same was overdue and payment thereof had been demanded of the defendant.

It prayed that Wilcox be required to answer "the several matters and things hereinbefore stated, as fully and particularly as if they were herein again repeated and he was thereunto especially interrogated, and that the premises aforesaid may be sold for payment of your orator's claim, with interest as aforesaid, and that your orator may have such further or other relief as his case may require."

July 20, 1914, the defendant filed an answer and a cross-bill.

August 3, 1914, the plaintiff filed motions to strike the answer
125 and the cross-bill. July 29, 1915, these motions were denied.

October 26, 1915, no demurrer, plea or answer to said cross-bill having been filed, although it should have been before the Rule Day of the preceding month, the defendant filed a motion for a decree pro confesso upon the cross-bill. November 15, 1915, plaintiff filed motions to dismiss the answer and to dismiss the cross-bill. January 27, 1916, the court rendered an opinion and entered an order denying the defendant's motion for a decree pro confesso and granting the plaintiff's motions to dismiss the answer and the cross-bill unless they were amended within a limited time, to which rulings the defendant excepted.

In the opinion the court disposed of the motion to take the cross-bill pro confesso by saying that it was not pressed or insisted upon, and he regarded it as waived; and, having pointed out that a motion to strike related to formal matters while a motion to dismiss took the place of the old demurrer and related to "questions of law and of equity," he proceeded to consider whether the answer and the cross-bill stated an equitable defense or ground for relief, and held that, inasmuch as it was not alleged in either of them that the stipulation in the deed of January 14, 1913, whereby Wilcox assumed and agreed to pay the two mortgages, was inserted in the deed through fraud and without his knowledge or consent, but only alleged that the stipulation was not the contract entered into between him and the Landrons, the allegation did not state an equitable defence, as the conversations leading up to the execution of the deed were merged in it; and that neither the answer nor the cross-bill asked for reformation of the deed but sought to avoid it "on the ground of parole conversations beforehand."

As to the allegations in the cross-bill—that the deed of January 14, 1913, was null and void because the notary before whom it was executed was, at the time, a stock-holder in and president of the bank,

and that the witnesses to the deed were then in the employ of the notary, either of which facts would render the deed null and void under Section 20 of the law concerning notaries (Section 1998 of the Revised Statutes and Codes of Porto Rico)—the court did not undertake to determine whether they set forth a valid defense, saying that he did not consider the question as at present before the court; that "if it be a valid defense, it arises out of the trans-
126 action sued on by the plaintiff and is, therefore, within the scope of Equity Rule 30 as to set-off and counter-claim," and such being the case, it "can be set up in an answer and does not need a cross-bill."

July 5, 1916, the defendant filed an amended answer wherein, among other things, he alleged that prior to the date of the execution of the deed of January 14, 1913, he was the owner of a second mortgage upon the property in question which he had proceeded to foreclose so far as to obtain a decree of foreclosure and was about to sell the same to satisfy his judgment, when, at the instance of Damian Monserrat, Senior, he was induced to forego the selling of the property and to enter into an agreement to assume payment of the mortgage for $4,600 and cancel his judgment against the Landrons upon Landron and wife agreeing to deed the property to him; that said Monserrat, being aware of the terms of the agreement, was to prepare the deed for execution; that the terms of the agreement between him and Landron were reduced to writing; that thereafter said deed of January 14, 1913, was prepared by Monserrat; that it was written in the Spanish language and was of great length; that, on being assured by Monserrat that it faithfully stated the agreement between him and the Landrons, he was induced to accept and sign the deed; that he never promised to pay the $1,700 mortgage and did not know of its existence until after the deed of January 14, 1913, was made and accepted; that Monserrat was, at the time he prepared the deed, the president and attorney of said bank and a stockholder therein; that he was largely, if not wholly, responsible for the loan to Landron; that the mortgage of December 3, 1912, for $1,700 was a third mortgage upon the property and was a loss to the bank if it existed; and that the change made in the deed from that of the agreement entered into between him and the Landrons was a fraudulent effort to unload the $1,700 indebtedness upon the defendant. It was further alleged that Monserrat, at the time he took the acknowledgment of the deed, was the president, legal representative and a heavy stockholder in the bank, and that the witnesses to the execution of the instrument were in his employ, all of which was in violation of law and rendered the instrument null and void. He prayed
(1) that the bill be dismissed and the plaintiff take nothing
127 thereby, and (2) that the deed of January 14, 1913, be held for cancellation and declared null and void. This answer was made under oath.

A trial having been had, on August 25, 1916, a decree of foreclosure was entered, in which it was adjudged that the defendant, by virtue of the deed of January 14, 1913, purchased the property in question and assumed and became liable to pay the two mortgages

held by the Bank, and that there was then due and owing it on said mortgages the sum of $9,631.92. It was further ordered and decreed that the defendant pay the complainant said sum, with interest, within ninety days, and, in default thereof, that the mortgaged property be sold and all rights of the respondent forever barred and foreclosed.

At or about the time this decree was entered an opinion was filed in which it appears that the court viewed the question presented by the evidence to be whether the defendant was informed of the existence of the $1,700 mortgage of December 3, 1912, which was not recorded until January 28, 1913, at the time he accepted the deed of January 14, 1913, without regard to whether he then in fact knew of the stipulation inserted in the deed of January 14 with reference to the mortgage for $1,700 and held that, regarding, as he did, the deed of January 14 as the primary source of evidence in the transaction, he felt controlled by the stipulation therein contained as to the $1,700 mortgage, for he could not regard the evidence of fraud of such persuasive character as to convince him that the deed did not state the real transaction. He did not consider the defense set up as to the invalidity of the deed by reason of the notary, Monserrat, being the president and a large stock-holder in the bank, and the witnesses to the deed being the employees of the notary.

We do not deem it necessary to consider at length the questions presented by the motions to dismiss the original answer and the cross-bill. Neither that answer nor the cross-bill alleged that the stipulation relied upon by the plaintiff was introduced into the deed of January 14, 1913, through fraud; and the answer contained no allegations, as did the cross-bill, with reference to the nullity of the deed. There would seem to be no reason, however, why the court below, even though the cross-bill did not answer the requisites of such a bill when tested by the technical rules of pleading in equity, should not have regarded it as an answer and decided whether the defense set up as to the nullity of the deed presented a valid defense; for, in Rule 18 of the General Equity Rules, it is provided that "Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished," and in Rule 19, that "The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." In other words, it seems to us that the purpose sought to be accomplished by the General Equity Rules is that if the substantial rights of the parties may be ascertained and determined according to the allegations contained in the pleadings, it is the duty of the court to consider and decide them without regard to the form in which they are presented, if they may be rightly understood.

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But, inasmuch as the defendant was allowed to file an amended answer, which he did and in which he set up, among other defenses, the defense of nullity of the deed because of the interest of the notary and the witnesses being his employees, we think that the defendant was in no way injured by the granting of the motion to dismiss the cross-bill without the merits of the defense having then been determined.

It remains to be considered whether the allegations of fraud and nullity set up in the amended answer present valid grounds of defense, and, if so, whether the weight of the evidence calls for findings in accordance therewith.

It is in substance conceded and there can be no doubt, if the stipulation with reference to the assumption by the defendant of the $1,700 mortgage was inserted in the deed through the fraud of the notary, that it is a valid ground of defense as to that mortgage, for the defendant could not be charged with its payment, as was sought to be done in the bill and as was in fact done in the decree. The object of setting out in the bill of complaint the stipulation wherein it is alleged that the defendant assumed and agreed to pay the two mortgages for $4,600 and $1,700 was (1) to make the $1,700 mortgage, which in the absence of the agreement in the deed would be a third mortgage, a second mortgage and enlarge the amount which the defendant would be required to pay in order to redeem, and (2) to conclude
129 him as to the balance due on the judgment after applying the sum realized from the sale of the mortgaged property when he is sued for that balance. Although the decree rendered in the foreclosure suit does not expressly provide for a deficiency judgment, the defendant would nevertheless be concluded by that decree as to his obligation to pay the balance due, which could be recovered against him in a subsequent suit. Coney v. Winchell, 116 U. S. 227, 230.

If, however, the stipulation as to the $1,700 mortgage was inserted through fraud, this alone would not militate against a judgment of foreclosure being entered against the defendant as to the mortgage for $4,600 and charging him with the payment of the debt secured therein. But if the stipulation in the deed as to the payment of the $4,600 mortgage was rendered invalid by reason of the deed being a nullity, having been executed before a notary not authorized to act in the premises, or because witnessed by his employees, we think a judgment charging the defendant with the payment of the amount of the debt secured by that mortgage could not be sustained, and for the reasons above given.

As to the question of fraud the defendant's evidence showed that, having procured a judgment of foreclosure in the sum of $1,465.35 on a mortgage which he held on the property, which mortgage was a second mortgage to that of the bank for $4,600, and being about to sell the property at public sale to satisfy the judgment, Damian Monserrat, Senior, came to him to see if there might not be a way of settling the matter without subjecting Landron, the mortgagor and a fellow lawyer, to the humiliation of advertising his property at public sale, and requested the defendant to go to the office of Landron to discuss the matter; that shortly thereafter he met Monserrat, Senior, at Landron's office and that a Mr. Timpson accompanied him there; and after discussing the matter it was finally agreed between Landron and the defendant that the latter would take a transfer of the property in satisfaction of his judgment and would become responsible for the mortgage indebtedness recorded on the books of the Registry of Property of a date prior to the defendant's mortgage; that nothing was said about a mortgage of $1,700 or any other mortgage indebtedness ex-

cept that which the bank held for $4,600; that, after the terms had been agreed upon, Monserrat, who was to draw the deed, left
130 the office; that shortly thereafter the agreement entered into between the defendant and Landron was, on January 13, 1913, reduced to writing and signed by the parties, one copy of which was given to Landron and the other retained by the defendant, and that Timpson signed the agreement as a witness to Landron's signature; that by the terms of this agreement Landron, representing himself and as attorney in fact for his wife, contracted to sell the house and lot in question to the defendant; that the consideration therefor should be the amount of the judgment stated in the decree in the defendant's foreclosure proceeding; that the defendant would assume the duly registered incumbrances on the property appearing of a date prior to the defendant's mortgage; that if within thirty days from the date of the agreement Landron desired he might repurchase the property for the judgment plus the sum of $500 and all expenses necessary in connection with the resale of the property; that in case he did not conclude to repurchase the same within thirty days he should vacate the property promptly and pay as rental for the time he remained therein a sum "equal in amount to the interest for that time, payable to the bank of Porto Rico upon the mortgage held by said bank against said property;" that on the following day, to wit, January 14, 1913, the parties met at the office of Monserrat, Senior, the notary, and executed the deed that contained the provision stating that the defendant assumed the mortgage of $1,700 held by the bank as well as that he assumed the mortgage for $4,600; that the defendant did not read the deed, which was written in long hand in the Spanish language and covered several pages, as he was in a hurry, and that it was not read to him; that before signing it the notary, Monserrat, Senior, assured him that it was drawn in accordance with the agreement which the parties had made and that, relying on this, he signed and accepted the deed; that he had not seen Monserrat, Senior, from the time he was at the office of Landron when the agreement was made up to the time the parties met at the office of the notary to sign the deed; that a few months after this transaction took place the defendant called at the plaintiff bank and paid the interest claimed to be due on the bank's mortgage; that thinking that the interest which he was called upon to pay was greater than it should have been he thereafter examined the deed and for the first time
131 learned that it contained a provision whereby he assumed the payment of the $1,700 mortgage; that this was the first knowledge that he had of this provision of the deed; and that he thereafter declined to pay and did not pay any further interest. Mr. Timpson was called as a witness and testified that he was present at Landron's office at the time the agreement was entered into and that Monserrat, Senior, was present; that afterwards, on the agreement being reduced to writing, he took a memorandum of the agreement drawn up in duplicate to Landron's office, who read and signed it; and that he himself signed the paper as a witness.

On behalf of the plaintiff, Monserrat, Senior, testified that he did not recall being present at Landron's office at the time the agreement

was made; that the only knowledge he had of the agreement between Landron and the defendant was obtained from the defendant himself, who called to see him at a time prior to the parties appearing at his office to execute the deed; that the defendant then told him the terms of the agreement of which he made a memorandum from which he afterwards drew the deed and that the deed was made in accordance with the instructions thus received; that at the time the parties met to sign the deed the defendant read the deed himself and that he, the notary, also read the deed to the defendant and the witnesses to the deed. The plaintiff did not call the witnesses to the deed to testify but did call Landron, who testified that while he remembered that Wilcox came to his office to talk about the settlement he did not remember that Monserrat, Senior, was there with him at that time; that he signed the document that had been agreed upon, drawn up, as he supposed, by Wilcox and brought to him by an American whose name he did not know but who used to attend to some business for Wilcox. His testimony was inaccurate and confused as to the details of the different transactions and he gave no testimony as to whether at the time the deed was signed it was read over by Wilcox or by Monserrat, Senior, the notary, in the presence of Wilcox.

It was agreed that Monserrat, Senior, at the time the deed was executed, was the president of the bank and a stockholder therein, and the allegation in the sworn answer of the defendant that Monserrat was largely, if not wholly, responsible for the loans from the bank to Landron was nowhere denied in the testimony.

132 The written memorandum of January 13, 1913, was offered in evidence by the defendant and was excluded subject to exception, but was permitted to be read. Why this document was excluded and why its contents were permitted to be read into the record is not entirely clear. It surely was competent evidence to be considered together with other proof upon the question of fraud. Whether any weight was given to it as evidence we have no way of ascertaining. The reasonable conclusion would seem to be that, having excluded it, the court gave it no weight but allowed it to be read into the record to show the nature of the agreement in case its exclusion might subsequently be brought in question. It was an important piece of testimony upon the question of fraud and should have been received. It showed that Wilcox had agreed with Landron to assume the mortgage given to the bank which was duly registered and bore a date prior to the defendant's mortgage, and that Landron, in case he did not repurchase the property, was to pay as rental, for the time he occupied the premises, the amount of the interest upon the mortgage held by the bank. That this was their agreement seems to be clearly established and the question is, if we assume that Monserrat, as he testified, received his information as to the terms of the agreement from Wilcox, whether it is reasonably probable that Wilcox, having made the agreement that he did with Landron, could have told Monserrat that he had agreed to assume, not only the $4,600 mortgage held by the bank, but also the $1,700 mortgage, or that he read the deed or the provision in it binding him

to pay the $1,700 mortgage, or that the deed was read to him by Monserrat. What was he to gain by entering into such a transaction? He held a mortgage upon the property that ante-dated the $1,700 mortgage, upon which he had obtained a judgment of foreclosure and the property had been advertised for sale on the fifth of the following month, when the equity of Landron would be extinguished. He stood to lose, not to gain, by making such an agreement, and the reasonable inference is that he did not do so.

But the interest of Monserrat, Senior, in the transaction was quite different. He was the president of the bank that held the $1,700 mortgage; he had been largely instrumental in making the loan from the bank to Landron, and he was individually interested in the welfare of the bank, being a stockholder in it; and it seems
133 to us that the evidence, when taken as a whole, demonstrates that he purposely concealed from Wilcox the fact that the deed obligated him to pay the $1,700 mortgage, and that the court below erred in finding that Wilcox was responsible for and bound to pay the sum called for by that mortgage.

Section 20 of the Notarial Law of Porto Rico, of March 8, 1906 (Section 1998 of the Compilation of 1911), reads as follows:

"The following public instruments shall be null and void:

"First. Those in which the notary authorizing same has intervened as a party thereto, or which contain any provision in his favor.

"Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument are witnesses thereto."

As above pointed out, if Monserrat, the notary before whom the deed was constituted, intervened as a party to the deed, or it contained any provision in his favor, or was witnessed by his relatives, clerks or servants, the deed was a nullity and the obligation contained therein by which Wilcox assumed to pay the mortgage of $4,600 became unenforcible.

The plaintiff contends that it acquired no interest whatsoever under the deed by Wilcox's assumption of the mortgage indebtedness for $4,600, or by his assumption of the mortgage for $1,700, even if that was not brought about through fraud; and that it could at any time foreclose the mortgages either against Wilcox or Landron, as the "right of action was always against the property and not against the person." But this contention loses sight of the fact that, in this proceeding, the bank is not seeking simply to foreclose the rights of Wilcox in the property, but to charge him with the obligation to pay the indebtedness secured by the mortgages, and that its right to do so depends upon the validity of the deed and the provisions contained therein as to Wilcox's assumption of the indebtedness secured by the mortgages (Ayers v. Wiswell, 112 U. S. 187; Willard v. Wood, 135 U. S. 309; Keller v. Ashford, 133 U. S. 610; Union Life Ins. Co. v. Hanaford, 143 U. S. 187, 190; Garnsey v. Rogers, 47 N. Y.
134 233, 241), and that the bill of complaint alleges the assumption of these obligations as a ground for effecting this result. We are therefore of the opinion that the bank, if the deed was

valid, would acquire an interest in Wilcox's assumption of the $4,670 mortgage, and the question is whether Monserrat, Senior, the notary, by reason of his being the chief executive officer of the bank and a substantial stockholder, had such an interest as would disqualify him from acting as notary in the transaction within the meaning of the Notarial Law above quoted.

While the provisions of this law are old, being taken from the Spanish Notarial Law, no decisions of the Spanish courts construing them have been called to our attention, and it is asserted by counsel that none are to be found, for the reason that under the Notarial Law of Spain a notary could not take part in his notarial district in the administration of a bank of discount, or a brokerage establishment or any commercial or industrial company, and that a notary, not being permitted to be an executive of a bank, no occasion for a construction of the law has arisen.

The provision of law prohibiting a notary from taking part in the administration of a bank in his notarial district is not now in force in Porto Rico, but inasmuch as it was embodied in the old Notarial Law of the Island of which Section 20 was a part, it would seem that it might be availed of in ascertaining the meaning of the section. But, however this may be, we think that Section 20 is capable of but one of two constructions; that either it means that a deed should be void if the notary before whom it was acknowledged had any interest in the transaction, however slight, or that it should be void only in case it was made to appear as a fact that his interest was sufficiently large to cause him to be biased. Opinion of the Justices, 75 N. H. 313, and cases there cited. And on either construction it seems to us the defendant must prevail, for we are of the opinion that, inasmuch as the notary was the president and a substantial stockholder in the bank, he had a material interest in the transaction which would disqualify him to act as notary and that the deed is a nullity.

We are also of the opinion that the deed was null and void and the provision in question unenforcible for the reason that the
135–36 witnesses to the deed were the clerks or servants of the notary. In the amended answer, which was under oath, the defendant has alleged as a fact that the witnesses to the execution of the deed were in the employ of Monserrat, the notary. The bill of complaint did not waive an answer under oath, but called upon the defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated, and he was therein especially interrogated. The plaintiff offered no evidence whatever in denial of those allegations. It is a rule in general chancery practice that, when an answer is under oath, such parts of it as are responsive to the bill are evidence equal to the testimony of one creditable witness and are therefore to be taken as true unless outweighed by a preponderance of evidence. Kennedy v. Custer, 174 Fed. 972; Jacobs v. Van Sickle, 127 Fed. 62; Campbell v. Northwest Eckington Co., 229 U. S. 561, 574, 579; Vigel v. Hopp, 104 U. S. 441; Clark's Executors v. Van Riemsdyk, 13 U. S. 153, 160; 1 Whitehouse Equity Practice, Sec. 282.

The bill should have been dismissed, it having been brought against Wilcox as the owner of the equity, when in fact he was not the owner, the deed to him being a nullity, and Landron not having been made a party. Terrell v. Allison, 88 U. S. 289; Whitehouse Equity Practice, Sec. 68.

The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill, and the appellant recovers his costs.

137–38 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1311.

ELIAS B. WILCOX, Defendant, Appellant,

v.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, PORT RICO, Plaintiff, Appellee.

Final Decree.

December 3, 1918.

This case came on to be heard November 6, 1918, upon the transcript of record of the District Court of the United States for the District of Porto Rico and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 3, 1918, here ordered, adjudged and decreed as follows: The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill, and the appellant recovers his costs.

By the Court;

ARTHUR I. CHARRON, *Clerk.*

139–40 *Petition of Plaintiff, Appellee, for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.*

(Filed February 27, 1919.)

To the Honorable the Judges of the Circuit Court of Appeals for the First Circuit:

The said plaintiff, appellee, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the First Circuit and that decree therein was rendered and filed on the 3d day of December, 1918, reversing the decree of the District Court of the United States for the District of Porto Rico and remanding said cause to said District Court with directions to

enter a decree dismissing the bill and that the appellant recover his costs, that the matter in controversy in said suit exceeds in value one thousand dollars, besides costs, and that this cause is one in which the decree of the Circuit Court of Appeals is not final and is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore said plaintiff, appellee, being aggrieved by said decree of the Circuit Court of Appeals, appeals therefrom and prays that an appeal be allowed it in the above entitled cause and that the Clerk of the United States Circuit Court of Appeals for the First Circuit be directed to send the record and proceedings in said cause with all things concerning the same to the Supreme Court
141–42 of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellee may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

By its Solicitor and Counsel,

BOYD B. JONES.

Allowed:

GEORGE W. ANDERSON,
Circuit Judge.

Assignment of Errors Filed by the Plaintiff, Appellee, in Connection with its Petition for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.

(Filed February 27, 1919.)

And now comes the plaintiff, appellee, and says that the decree of the Circuit Court of Appeals entered in the above entitled suit on the 3d day of December, 1918, is erroneous and unjust to it—

First. Because the Circuit Court of Appeals erred in adjudging and decreeing that said Monserrat, Sr., concealed from said Wilcox, appellant, the fact that said deed of purchase and sale of January 14, 1913, obligated the appellee to pay said mortgage for $1700.

Second. Because the Circuit Court of Appeals erred in adjudging and decreeing that the said District Court erred in finding
143–44 that said Wilcox, appellant, was responsible for and bound to pay the sum called for by said mortgage for $1700.

Third. Because the Circuit Court of Appeals erred in adjudging and decreeing that said Wilcox, appellant, was induced to sign said deed of purchase and sale by any fraud practised on him.

Fourth. Because the Circuit Court of Appeals erred in adjudging and decreeing that the right of the plaintiff, appellee, to maintain said bill to foreclose said mortgage of $4600 by a sale of the mortgaged premises is barred or defeated by any fraud or concealment practised on said Wilcox, appellant.

Fifth. Because the Circuit Court of Appeals erred in adjudging and decreeing that the right of the plaintiff, appellee, to maintain said bill to foreclose said mortgage of $1700 by a sale of the mort-

gaged premises is barred or defeated by any fraud or concealment practised on said Wilcox, appellant.

Sixth. Because the Circuit Court of Appeals erred in adjudging and decreeing that said deed of purchase and sale was a nullity, and the obligation contained therein by which the defendant, appellant, assumed to pay the mortgage of $4000 was unenforceable.

Seventh. Because the Circuit Court of Appeals erred in
145–46 adjudging and decreeing that said deed of purchase and sale was a nullity, and the obligation contained therein by which the defendant, appellant, assumed to pay the mortgage of $1700 was unenforceable.

Eighth. Because the Circuit Court of Appeals erred in adjudging and decreeing that said Monserrat, Sr., the Notary authorizing said deed of purchase and sale, was a party thereto.

Ninth. Because said Circuit Court of Appeals erred in adjudging and decreeing that said deed of purchase and sale contained any provision in favor of said Monserrat, Sr., the Notary authorizing the same.

Tenth. Because the Circuit Court of Appeals erred in adjudging and decreeing that said deed of purchase and sale was null and void and the provisions thereof unenforceable for the reason that the witnesses to the same were the clerks or servants of said Monserrat, Sr., the Notary authorizing the same.

Eleventh. Because the Circuit Court of Appeals erred in adjudging and decreeing that said deed of purchase and sale was null and void and the provisions thereof unenforceable for the reason that the Notary authorizing the same was a party thereto.

Twelfth. Because the Circuit Court of Apeals erred in
147–48 adjudging and decreeing that said deed of purchase and sale was null and void and the provisions thereof unenforceable for the reason that the same contained *any* provision in favor of the Notary authorizing the same.

Thirteenth. Because the Circuit Court of Appeals erred in not adjudging and decreeing that the decree of the District Court should be affirmed.

Fourteenth. Because the Circuit Court of Appeals erred in adjudging and decreeing that the bill be dismissed and the defendant, appellant, recover its costs.

By its Solicitor and Counsel,

BOYD B. JONES.

Order of Court.

February 27, 1919.

ANDERSON, *J.*:

Upon the filing of the appellee's petition for appeal to the Supreme Court of the United States, It is ordered that citation issue when an appeal bond in the sum of $250, with surety approved by the clerk, has been filed.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

149–50

Bond on Appeal.

(Filed March 4, 1919.)

Know all men by these presents that we, El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, a corporation created by and existing under the laws of Porto Rico, as principal, and the United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland as surety, are held and firmly bound unto Elias B. Wilcox in the sum of Two hundred and fifty dollars (250) for the payment whereof we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

The condition of the foregoing obligation is such that

Whereas the said El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, is about to enter and institute an appeal to and in the Supreme Court of the United States from a decree of the United States Circuit Court of Appeals for the First Circuit entered on the 3d day of December, 1918, in a certain cause therein pending wherein the above named El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, is plaintiff and appellee and the said Elias B. Wilcox is defendant and appellant;

Now, therefore, if the said El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, shall prosecute its appeal
151–52 to effect and if it fails to make its appeal good shall answer all costs, then this obligation shall be null and void but otherwise shall remain in full force and effect.

Witness our hands and seals this 27th day of February, 1919.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, PORTO RICO, [SEAL.]
By BOYD B. JONES,
Attorney in Fact.

PHILIP N. JONES,
Witness to Signature of Boyd B. Jones, Atty. in Fact.

UNITED STATES FIDELITY & GUARANTY COMPANY. [SEAL.]
D. R. PENNELL &
WM. L. BRIST,
Attorneys in Fact.

Approved as to surety:
ARTHUR I. CHARRON, *Clerk.*

Cancelled Documentary stamp, 10 cents.

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(D. C. Form 147.)

Dock. 1396, Page 217.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Elias B. Wilcox, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the second day of April next, pursuant to an Appeal duly obtained from a decree of the United States Circuit Court of Appeals for the First Circuit, wherein El Banco Popular de Economias y Prestamos de San Juan, P. R., is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George H. Bingham, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit, this fourth day of March, in the year of our Lord one thousand nine hundred and nineteen.

GEORGE H. BINGHAM,
United States Circuit Judge.

E. B. WILCOX.

March 18th, 1919.

154 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

March 18th, 1919.

I hereby certify that on the eighteenth day of March, 1919, I served the within citation by handing to and leaving with Elias B. Wilcox a true and correct copy thereof.

[Seal United States Marshal, District of Porto Rico.]

W. R. BENNETT,
United States Marshal,
By B. F. MURPHY, *Deputy.*

Marshal's Fees:

Service	$2.00
Expenses	$8.40
	$10.40

155–56 United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1311.

ELIAS B. WILCOX, Defendant, Appellant,

v.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, PORTO RICO, Plaintiff, Appellee.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the cause entitled, Elias B. Wilcox, Defendant, Appellant, v. El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, Plaintiff, Appellee, No. 1311, in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal and the original Citation issued upon Elias B. Wilcox, Defendant, Appellant, in said cause with service endorsed thereon.

157 In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit this twenty-seventh day of March, A. D. 1919.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

Endorsed on cover: File No. 27046. U. S. Circuit Court Appeals, 1st Circuit. Term No. 960. El Banco Popular de Economias y Prestamos de San Juan, P. R., appellant, vs. Elias B. Wilcox. Filed April 5th, 1919. File No. 27046.

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No. 346 91

Supreme Court of the United States.

October Term, 1918.

No.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
PLAINTIFF, APPELLANT,

v.

ELIAS R. WILCOX,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Plaintiff, Appellant, in Support of Jurisdiction.

BOYD B. JONES,
Solicitor for Appellant.

GEORGE C. GOODWIN & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

October Term, 1918.

No.

EL BANCO POPULAR DE ECONOMIAS
Y PRESTAMOS DE SAN JUAN, P.R.,
Plaintiff, Appellant,
v.
ELIAS B. WILCOX,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Plaintiff, Appellant, in Support of Jurisdiction.

Statement of Case.

This is an appeal from a final decree of the Circuit Court of Appeals reversing the final decree of the District Court of the United States for the District of Porto Rico ordering the defendant to pay to the plaintiff $9631.92, the amount due on two mortgages of real estate in Porto Rico, the unpaid principal of which amounted to $6300, directing, in default of such payment, a foreclosure of the mortgages by sale and establishing a personal liability of the defendant for said

indebtedness, which, as stated in the opinion of the Circuit Court of Appeals in this case, when thus established could be enforced as to any deficiency by suit against him.

Coney v. *Winchell*, 116 U.S. 227, 230.

The few references to the record are not supplemented by the page numbers, because the parties have not yet received the printed copies of the record.

Argument.

The motion to dismiss is based upon the ground thus stated in the defendant's brief: "The jurisdiction of the district court was based solely upon the diverse citizenship of the parties, the bank being a Porto Rican corporation and Wilcox a citizen of the United States."

But the jurisdiction of the District Court was not based upon diversity of citizenship; it rested upon the fact, as alleged in the bill of complaint, that the defendant was a citizen of the United States; and consequently the case is not one wherein the decree of the Circuit Court of Appeals is final, section 128 of the Judicial Code, but is one wherein there is an appeal of right to the Supreme Court under section 241 of the Code.

The Act of April 12, 1900, c. 191, sec. 34, 31 Stat. 84, created the District Court of the United States for the District of Porto Rico, with the "ordinary jurisdiction of district courts of the United States," as well as "jurisdiction of all cases cognizant in the circuit courts of the United States."

Under the Act of August 13, 1888, c. 866, sec. 1, in

force at the enactment of the statute above referred to, the Circuit Courts of the United States had jurisdiction of controversies "between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs," the sum or value of $2000.

The present suit is one between a corporation created by the laws of Porto Rico and a citizen of that territory—

Martinez v. *La Asociacion De Senoras*, 213 U.S. 20—

and a citizen of the United States resident in Porto Rico. This controversy, therefore, is not between citizens of different states, because a citizen of a territory is not a citizen of a state and diversity of citizenship in the statutory sense does not exist.

New Orleans v. *Winter*, 1 Wheat. 91.
Downes v. *Bidwell*, 182 U.S. 244, 259.

The local conditions of Porto Rico required that the jurisdiction of the United States District Court of Porto Rico should be extended to certain controversies wherein diversity of state citizenship did not exist, including any controversy involving $1000 to which a citizen of the United States was a party, regardless of the citizenship of the other party to the suit; and by the Act of March 2, 1901, c. 812, sec. 3, 31 Stat. 953, it was provided that—

> "the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace

> controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Cases between citizens of Porto Rico not arising under the Federal laws were thus left outside of and cases to which a citizen of the United States or a subject of a foreign State is a party were brought within the jurisdiction of the District Court.

Section 128 of the Judicial Code as amended by the Act of January 28, 1915, c. 22, sec. 2, provides that—

> "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

The decree of the Circuit Court of Appeals in the present case is not final, first, because the jurisdiction of the District Court was not "dependent entirely upon the *opposite* parties to the suit or controversy being aliens and citizens of the United States or citizens of different States" in that, by the Act of March 2, 1901, already quoted, its jurisdiction existed by the mere fact of the defendant's being a citizen of the United States, and, second, because the parties to this suit are not an alien on the one side and a citizen of the United States on the other, inasmuch as the plaintiff was a citizen of Porto Rico—

Martinez v. *La Asociacion De Senoras*, 213 U.S. 20;
Barrow Steamship Co. v. *Kane*, 170 U.S. 100—

and was neither a citizen of a foreign country—

De Lima v. *Bidwell*, 182 U.S. 1;
Porto Rico v. *Castillo*, 227 U.S. 270—

nor a citizen of a state.

Barney v. *Baltimore*, 6 Wall. 280.

It therefore follows that this Court has jurisdiction of the appeal under section 241, which is as follows:

> "In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

The defendant's contention that, under sections 128 and 241 of the Judicial Code, appeals to the Supreme Court are authorized only in those cases which might have been appealed directly from the District Court, is untenable.

Korbly, Receiver, v. *Springfield Institution for Savings,* 245 U.S. 330.

Respectfully submitted,
BOYD B. JONES,
Solicitor for Appellant.

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Supreme Court of the United States.

October Term, 1919.

No. 91

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
PLAINTIFF, APPELLANT,

v.

ELIAS B. WILCOX,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Plaintiff, Appellant, in Support of Jurisdiction.

ANDREW C. SPENCER & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 990.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
PLAINTIFF, APPELLANT,
v.
ELIAS B. WILCOX,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF PLAINTIFF, APPELLANT, IN SUPPORT OF JURISDICTION.

The appellant filed a brief in opposition to the original motion to dismiss, which was withdrawn by the appellee, and it asks the Court to consider that brief in passing on the present motion.

The appellee seeks to avoid the force of the statutes referred to in the appellant's original brief in support of jurisdiction by invoking the decision of this Court in *Inter-Island Co.* v. *Ward*, 242 U.S. 1. In that case it was decided that a writ of error will not lie from the Supreme Court to review a judgment of the Cir-

cuit Court of Appeals in a case, presenting neither diversity of citizenship nor a federal question, which was taken to that Court from the Supreme Court of Hawaii pursuant to Judicial Code, sec. 246, as amended by the Act of January 28, 1915, c. 22, 38 Stat. 803, upon the basis only of pecuniary amount.

Under sections 128, 238 and 246 of the Judicial Code, as amended by the Act of June 28, 1915, c. 22, appeals from the Supreme Court of Hawaii and Porto Rico to the Supreme Court of the United States and to the Circuit Court of Appeals and from the District Courts of the territories to the Circuit Court of Appeals are governed by the same provisions, and the decrees of the Appellate Courts have like effect. Prior to the Act of 1915 appeals from the Supreme Courts of the territories to the Supreme Court of the United States could be taken in any case wherein the amount in controversy exceeded $5000, and, regardless of amount, in cases arising under the Constitution and laws of the United States.

Section 246 of the Judicial Code as amended transferred the appellate jurisdiction in territorial Supreme Court cases not arising under the Federal Constitution and laws from the Supreme Court of the United States to the appropriate Circuit Court of Appeals. It was of course obvious that a statute framed for the purpose of relieving the Supreme Court of the United States from the burden of reviewing this class of cases would not be interpreted as affording that relief by one provision and taking away the relief by another unless both the spirit and letter of the statute required it.

The contention of the defendant, appellee, that the

rule laid down as applicable to appeals from the Supreme Courts of the territories should be applied to appeals from the District Courts of the territories is in effect an attempt to have the distinction heretofore observed between the two classes of cases disregarded and the plain and well-established meaning of the language of the statutes rejected upon the assumption that the judiciary, if clothed with legislative powers, would not take jurisdiction to review on appeal final decrees of the Circuit Court of Appeals in cases where the jurisdiction rests upon the fact that one of the parties is a citizen of the United States. This contention is unsupported either by existing or antecedent legislation.

On the one hand, section 6 of the Court of Appeals Act of March 3, 1891, the ancestor of sections 128 and 241 of the Judicial Code, is specifically limited in its terms to appeals from the District and Circuit Courts, and there is nothing in the re-enactment of the provisions of section 6 as a part of the Code to indicate an intention to include within the scope of section 241 appeals from and writs of error to the Supreme Courts of Porto Rico and Hawaii; obviously the above re-enactments did not deal with appeals from territorial Supreme Courts, and, as pointed out in the case of *Inter-Island Co.* v. *Ward, supra,* such appeals and writs of error were not from the beginning or in the end controlled by the law generally applicable to Courts of the United States, but were governed by special provisions.

On the other hand, the appellate jurisdiction of Circuit Courts of Appeals of cases from the District Courts of Hawaii and Porto Rico, by section 128 of

the Judicial Code, as amended by the Act of January 28, 1915, is specifically declared to be final in cases which do not include the one at bar. The case at bar, unlike the *Inter-Island Co.* case, is a District Court case, and as such has never been governed by the special provisions applicable only to cases in the territorial Supreme Courts, but is expressly made subject to the general provisions governing appeals from District Courts.

Moreover, there is no provision whereby this case could be reviewed by the Supreme Court on certiorari. Section 240 of the Judicial Code provides:

> "In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

But neither section 128, enumerating the cases in which judgment and decrees of the Circuit Court of Appeals shall be final, nor any other section of the Judicial Code contains any provision making final, judgments and decrees of the Circuit Courts of Appeals where the jurisdiction of the District Court is dependent upon the fact that the parties or either of them are citizens of the United States.

Therefore, if jurisdiction is denied, cases appealed from the District Courts of Hawaii and Porto Rico

to the Circuit Courts of Appeals, in which the jurisdiction of the District Courts depended upon the fact that the parties or either of them were citizens of the United States or of a foreign state, cannot be reviewed by the Supreme Court either by appeal or writ of error or by certiorari.

It is improbable that Congress could have intended to afford neither appeal or writ of error nor certiorari in such cases.

It is suggestive that the case of *Inter-Island Co.* v. *Ward* was reviewable by the Supreme Court of the United States directly from the territorial Supreme Court on certiorari under the provisions of section 246 of the Judicial Code as amended.

Respectfully submitted,

BOYD B. JONES,

Solicitor for Appellant.

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Supreme Court of the United States.

October Term, 1938.

No. 827.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
APPELLANT,

v.

ELIAS R. WILCOX,
APPELLEE.

APPEAL FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of El Banco Popular de Economias y Prestamos de San Juan, P.R., Appellant.

ROYD E. JONES,
PHILIP H. JONES,
Solicitors for Appellant.

ADDISON C. HARRIS, LAW PRINTER, WASHINGTON, D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 960.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
APPELLANT,
v.
ELIAS B. WILCOX,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of El Banco Popular de Economias y Prestamos de San Juan, P.R., Appellant.

STATEMENT OF THE CASE.

This is an equity appeal from a final decree (r. p. 99) of the Circuit Court of Appeals for the First Circuit reversing the final decree (r. p. 34) of the District Court of the United States for the District of Porto Rico which ordered the appellee (hereinafter referred to as the defendant) to pay to the appellant (hereinafter referred to as the plaintiff) $9631.92, the amount due on two mortgages of real estate in Porto Rico, the unpaid principal of which amounted to $6300, and directed in default of such payment a foreclosure of the

mortgages by sale, thus establishing a personal liability of the defendant for said indebtedness which could be enforced as to any deficiency by suit against him.

Coney v. *Winchell,* 116 U.S. 227, 230.

The jurisdiction of the District Court is based wholly upon the facts alleged in the bill (r. p. 2) and admitted by the answer (r. p. 17), that the defendant is a citizen of the United States and that the matter in dispute exceeds the sum of $1000.

The appellee filed a motion to dismiss this appeal on jurisdictional grounds, and the question of jurisdiction has been argued on briefs heretofore filed.

Consideration of the question of jurisdiction having been postponed by the Court, the appellant will reargue that question herein.

There is thus presented the plaintiff's first proposition; namely:

1. The decree of the Circuit Court of Appeals is not final and the Supreme Court has jurisdiction on appeal to review it.

Excepting as otherwise pointed out, the following facts found by the District Court are undisputed:

On the 14th day of January, 1913, the defendant as a purchaser and one Landron as vendor executed a deed of purchase and sale whereby for the expressed consideration of $7832.25 Landron conveyed to the defendant certain improved real estate in San Juan declared by the deed to be subject to the mortgages in question, which by the terms of the deed the defendant assumed and covenanted to pay as a part of said consideration, the balance being the release to Landron by the defendant of a claim of $1532.25 held by the defendant

against him (Defendant's Exhibit E, r. pp. 31, 32; Findings of District Court, r. pp. 85, 86; Final Decree of the District Court, r. pp. 34, 35; Opinion of the Circuit Court of Appeals, r. pp. 90-99).

One of these mortgages executed by Landron on July 29, 1909, to the plaintiff, registered August 3, 1909, was conditioned to secure the payment of $4600 on July 29, 1910, with interest at the rate of 1 per cent monthly, and for the payment to the amount of $500 of attorney's fees and expenses in case of judicial proceedings to enforce the mortgage (Plaintiff's Exhibit A, r. pp. 80, 82; Finding of District Court, r. p. 85). The other mortgage was executed by Landron to the plaintiff on December 3, 1912, registered January 28, 1913, and was conditioned to secure the payment of $1700 on December 3, 1913, with interest at the rate of 1 per cent monthly (Plaintiff's Exhibit B, r. p. 83; Finding of District Court, r. p. 85).

The defendant by his amended answer alleged in substance that he was induced to execute the deed of purchase and sale by the false representation of Mr. Monserrat, the president of and a stockholder in the plaintiff; that it was in accordance with an oral agreement between the parties to the deed that the defendant should assume only the mortgage for $4600, and that the defendant was then ignorant of the existence of the mortgage for $1700 (Answer, par. 3, r. pp. 17, 18).

On this issue the testimony of the witnesses was conflicting and the District Court judge before whom the witnesses appeared and testified found in favor of the plaintiff (Opinion of District Court, r. p. 86). The Circuit Court of Appeals, notwithstanding the finding

of the District Court to the contrary, found that Monserrat purposely concealed from the defendant the fact that the deed of purchase and sale obligated the defendant to pay the $1700 mortgage, and that the District Court therefore erred in finding that the defendant was responsible for and bound to pay the sum called for by that mortgage (Opinion of Circuit Court of Appeals, p. 97).

The plaintiff's first, second, third, fourth, fifth, thirteenth and fourteenth assignments of error (r. pp. 100, 101) present its second proposition; namely:

2. The Circuit Court of Appeals erred in finding that Monserrat purposely concealed from the defendant the fact that the deed of purchase and sale obligated the defendant to pay the $1700 mortgage, and in finding that the District Court erred in deciding that the defendant was bound to pay the sum called for by that mortgage.

Section 20 of the Notarial Law of Porto Rico of March 8, 1906 (section 1998 of the Compilation of 1911), provides as follows:

> "The following public instruments shall be null and void:
>
> "First. Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.
>
> "Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument are witnesses thereto."

Mr. Monserrat, the notary who authorized the deed of purchase and sale, was the president of the plaintiff and a stockholder (r. p. 50). On his appeal from

the decree of the District Court the defendant assigned as error the omission or refusal of the District Court to find that the deed was null and void because of Monserrat's official relation to the plaintiff and his interest as a stockholder therein (Defendant's Tenth and Eleventh Assignments of Error, r. p. 65). The Circuit Court of Appeals ruled that under the first clause of the above section Monserrat, by reason of his official relation and stockholding, was disqualified to act as the notary authorizing the deed of purchase and sale and that the deed was a nullity (r. pp. 97, 98).

Under the plaintiff's sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth assignments of error (r. p. 101) there is presented its third proposition; namely:

3. The Circuit Court of Appeals erred in ruling that the deed of purchase and sale was a nullity on the ground that Monserrat, the notary who authorized the same, was disqualified to act by reason of his official relation to the plaintiff and his interest as a stockholder.

The plaintiff's bill did not waive answer under oath, but called upon defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated and he was therein especially interrogated (r. p. 4).

Defendant's answer, which was under oath, after answering specifically the different allegations of the bill, proceeds in part as follows (r. pp. 19, 20):

> "IX. And your orator further submits as a fact constituting a violation of law well known to the said Monserrat and to the said Landron, that at the time said Monserrat acknowledged said bill of sale

> or deed as a Notary Public . . . the witnesses to the execution of said instrument were in his employ, all of which your orator submits is in violation of the law of Porto Rico, and your orator submits whether or not said acknowledgment does not, under said law, make said instrument null and void."

The plaintiff offered no evidence in denial and the defendant offered no evidence in support of paragraph IX.

The Circuit Court of Appeals ruled that these allegations of the answer were responsive to the bill and must be taken as true, and that the deed was null, void and unenforceable because the witnesses to the deed were the clerks or servants of the notary (r. p. 98).

The plaintiff's sixth, seventh, tenth, thirteenth and fourteenth assignments of error (r. p. 101) present its fourth proposition; namely:

4. The Circuit Court of Appeals erred in deciding that the deed of purchase and sale was null and void and the provisions thereof unenforceable on the ground that the witnesses to the same were the clerks or servants of Monserrat, the notary authorizing the same.

The Court of Appeals held that the bill should have been dismissed, "it having been brought against Wilcox as the owner of the equity when in fact he was not the owner, the deed to him being a nullity and Landron not having been made a party" (r. p. 99).

There is thus presented the plaintiff's fifth proposition under its thirteenth and fourteenth assignments of error (r. p. 101); namely:

5. Even if it be assumed that the deed of January 14, 1913, was null and void, the decree of the District Court should not have been reversed and the bill dismissed, but a decree of foreclosure should have been granted.

Other alleged errors were assigned by the defendant upon grounds which were not noticed by the Circuit Court of Appeals. It would suffice to say that they are without merit, but as the record presents them for the consideration of this Court—

> *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U.S. 334, 349—

there is thus presented the plaintiff's sixth proposition; namely:

6. The decree of the Circuit Court of Appeals cannot be sustained upon any of the grounds raised by defendant's assignments of error which were not relied upon by the Circuit Court of Appeals as grounds for its reversal of the decree of the District Court.

ARGUMENT.

I.

The decree of the Circuit Court of Appeals is not final and the Supreme Court has jurisdiction on appeal to review it.

The Supreme Court has jurisdiction of this appeal under section 241 of the Judicial Code, which is as follows:

> "In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Section 128 of the Judicial Code as amended by the Act of January 28, 1915, (38 Stat. 803,) c. 22, sec. 2, enumerates the cases wherein the decrees of the Circuit Court of Appeals are final, and is as follows:

> "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

Sections 239 and 240 relate to certificates by the Circuit Court of Appeals and to certiorari.

The jurisdiction in the case at bar was not based upon diversity of citizenship, nor was the case one which arose under the laws enumerated in section 128, and consequently the case is not one wherein the decree of the Circuit Court of Appeals is final. The jurisdiction was based upon the undisputed facts set

forth in the bill of complaint, that the defendant was a citizen of the United States and that the matter involved exceeded $1000.

The Act of April 12, 1900, c. 191, sec. 34, 31 Stat. 84, created the District Court of the United States for the District of Porto Rico, with the "ordinary jurisdiction of district courts of the United States," as well as "jurisdiction of all cases cognizant in the circuit courts of the United States."

Under the Act of August 13, 1888, c. 866, sec. 1, 25 Stat. 433, in force at the enactment of the statute above referred to, the Circuit Courts of the United States had jurisdiction of controversies "between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs," the sum or value of $2000.

The local conditions of Porto Rico required that the jurisdiction of the United States District Court of Porto Rico should be extended to certain controversies wherein diversity of state citizenship did not exist, including any controversy involving $1000 to which a citizen of the United States was a party, regardless of the citizenship of the other party to the suit; and by the Act of March 2, 1901, c. 812, sec. 3, 31 Stat. 953, it was provided that—

> "the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Cases between citizens of Porto Rico not arising under the Federal laws were thus left outside, and cases to which a citizen of the United States or a subject of a foreign state is a party were brought within, the jurisdiction of the District Court.

The present suit is one between a corporation created by the laws of Porto Rico and a citizen of that territory—

Martinez v. *La Asociacion De Senoras*, 213 U.S. 20—

and a citizen of the United States resident in Porto Rico. This controversy, therefore, is not between citizens of different states, because a citizen of a territory is not a citizen of a state and diversity of citizenship in the statutory sense does not exist.

New Orleans v. *Winter*, 1 Wheat. 91.
Downes v. *Bidwell*, 182 U.S. 244, 259.

It follows that the decree of the Circuit Court of Appeals was not final because the jurisdiction in the present case was not "dependent entirely upon the *opposite* parties to the suit or controversy being aliens and citizens of the United States or citizens of different states" (sec. 128), but existed under the Act of March 2, 1901, merely by virtue of the amount involved and the fact that the defendant was a citizen of the United States, the plaintiff being a citizen of Porto Rico—

Martinez v. *La Asociacion De Senoras, supra;*
Barrow Steamship Co. v. *Kane*, 170 U.S. 100—

and neither a citizen of a foreign country—

De Lima v. *Bidwell*, 182 U.S. 1;
Porto Rico v. *Castillo*, 227 U.S. 270—

nor a citizen of a state—

Barney v. *Baltimore*, 6 Wall. 280.

Section 241 is so explicit in granting a right of appeal in all cases in which the decree of the Court of Appeals is not made final and section 128 is so definite in the enumeration of those cases in which such appeal is made final that this case, not within that enumeration, is brought within the rule of the Court stated in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, at page 37:

> "'It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott* v. *Reid*, 10 Pet. 524, 527."

To any balancing of reasons there can be made the pertinent query, why should Congress have made final the final decrees of the Circuit Court of Appeals in cases arising under the patent laws or under the trade-mark laws or under the revenue laws or under the criminal laws or in admiralty cases, and have made appealable final decrees arising in cases under the statutes imposing personal liability on the holders of shares in national banks?

Korbly, Receiver, v. *Springfield Institution for Savings*, 245 U.S. 330.

The defendant seeks to avoid the force of the statutes referred to by invoking the decision of this Court

in *Inter-Island Co.* v. *Ward*, 242 U.S. 1. In that case it was decided that a writ of error will not lie from the Supreme Court of the United States to review a judgment of the Circuit Court of Appeals in a case, presenting neither diversity of citizenship nor a Federal question, appealed to that Court from the Supreme Court of Hawaii pursuant to Judicial Code, sec. 246, as amended by the Act of January 28, 1915, c. 22, sec. 2, 38 Stat. 803, upon the basis only of pecuniary amount.

Inasmuch as the case was not one of those enumerated in section 128 wherein the judgment or decree of the Circuit Court of Appeals was made final, the contention was made that under section 241 a writ of error to the Supreme Court of the United States would be maintained, but it was decided that section 241 was not applicable to cases arising in the Supreme Court of Hawaii, that appeals in such cases were not controlled by the laws generally applicable to Courts of the United States and that the intention of section 246 of the Judicial Code as amended by the Act of January 28, 1915, c. 22, sec. 2, 38 Stat. 804, was to restrict the jurisdiction of this Court and not to withdraw jurisdiction by one clause and restore it in whole or in part by another.

For convenience we have quoted, at pages 67 to 72, the more important statutes regulating jurisdiction of appeals from the District Courts and Supreme Courts of Hawaii and Porto Rico.

The Act of March 2, 1917, c. 145, sec. 41, 39 Stat. 965, with reference to the District Court of the United States for Porto Rico, now provides that—

> "Such district court shall have jurisdiction of all cases cognizable in the district courts of the

United States, and shall proceed in the same manner. In addition said district court shall have jurisdiction for the naturalization of aliens and Porto Ricans, and for this purpose residence in Porto Rico shall be counted in the same manner as residence elsewhere in the United States. Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid: Provided, That nothing in this Act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all controversies pending in said court at the date of the approval of this Act."

II.

The Circuit Court of Appeals erred in finding that Monserrat purposely concealed from the defendant the fact that the deed of purchase and sale obligated the defendant to pay the $1700 mortgage, and in finding that the District Court erred in deciding that the defendant was bound to pay the sum called for by that mortgage.

The deed of purchase and sale recited that both the defendant and the said Landron were lawyers (r. p.

30); that the property to be sold was subject to a recorded mortgage to the plaintiff to secure the payment of $4600 with interest at 1 per cent monthly and an additional credit of $500 for indemnities in case of judicial proceedings, and also to a mortgage for the payment of $1700 with interest at a like rate and an additional credit of $200 for like indemnities, which had not yet been recorded (r. pp. 30, 31); that the purchase price was $7832.25, from which was to be deducted the principal of said mortgages, viz., $6300, the payment of which with interest the defendant assumed and agreed to make (r. p. 32).

The District Court judge thus dealt with the issue of fraud presented by the pleadings and the evidence:

> "A good deal of evidence was taken pro and con, that of the plaintiff tending to show that not only was the defendant informed of the existence of this second mortgage but that he distinctly assumed it. On the other hand, the defendant testified himself and has other testimony to the effect that he was not informed of the second mortgage and whatever recitals are contained in the deed to him were not read by him, as he trusted the notary. The case therefore is not without difficulties upon the question of fact. The conclusion of the Court however is that the deeds are the primary source of evidence in the transaction, as in all similar transactions, and must control unless the evidence is very persuasive that there was a mistake or fraud of some kind, affecting the plaintiff bank. The Court cannot say that it is convinced by a preponderance of evidence that such was the case and must therefore be guided by the documents themselves" (r. p. 86).

The application of the above rule as to the burden of proof on the issue in question was more favorable to the defendant than the cases warrant.

In order to set aside, to annul or to correct a written instrument for fraud or mistake, the fraud or mistake must be proven by more than a preponderance of the evidence.

> *United States* v. *Maxwell Land Grant Co.*, 121 U.S. 325, 381.
>
> *Campbell* v. *Improvement Co.*, 229 U.S. 561, 584.
>
> *Atlantic Delaine Co.* v. *James*, 94 U.S. 207, 214.

In *United States* v. *Maxwell Land Grant Co., supra*, in holding that the rule applies *a fortiori* in cases where there is an attempt to set aside, correct or cancel for fraud evidences of title from the United States Government, the Court, by Mr. Justice Miller, say, at page 381:

> "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

In *Atlantic Delaine Co.* v. *James*, *supra*, also a suit to cancel an executed written contract claimed to have been obtained by false representations, the Court, by Mr. Justice Strong, say, at page 214:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved. . . ."

In *Campbell* v. *Improvement Co., supra,* a suit to have a deed absolute on its face decreed to be security only, the Court, by Mr. Justice Pitney, say, at page 584:

> " . . . to justify the setting aside of a solemn instrument of conveyance, deliberately made by parties *sui juris,* and the giving to it of an effect different from its plain purport, the evidence should be clear, unequivocal, and convincing."

It will appear from an examination of the evidence and of the opinion of the Circuit Court of Appeals that that Court failed to appreciate, consider or even mention documentary evidence of the most important character disproving the charges of fraud and demonstrating the defendant's lack of credibility, and further that in arriving at its conclusion the Circuit Court of Appeals acted in utter disregard of the rule requiring importance to be attached to findings of the trial Court which involve the credibility of witnesses who appear before it.

In the case at bar the issue whether the defendant, a lawyer, signed an agreement without reading it and whether a brother lawyer, for the purpose of benefiting a bank to the possible extent of $1700, made the false representations charged was one which peculiarly and justly required the observance of the rule.

It is suitable in this connection, before a review of the evidence, to refer to the language of the Court in *Lytle* v. *State*, 22 How. 193, at page 207:

> "The question of cultivation in May 1830, depended on the parol evidence of witnesses. The judges below knew them. They decided on the spot, with all the localities before them; and as the evidence is contradictory, it would be contrary to precedent . . . to overrule the finding of a mere fact by the courts below."

The rule is not peculiar to the Federal Courts and is thus stated in *Rubenstein* v. *Lottow*, 220 Mass. 156, at page 165:

> "So far as this claim is concerned the defendant has rested upon the familiar doctrine that a decision in equity upon the facts, whether by a judge or a master, will not be overturned unless plainly wrong when it is called in question by a court which has a right to review the finding; as to which see (*inter alia*) *Sawyer* v. *Clark*, 214 Mass. 124, 126; *Campbell* v. *Lima*, 212 Mass. 11; *Flagg* v. *Phillips*, 201 Mass. 216; *Blossom* v. *Negus*, 182 Mass. 515; *Chase* v. *Hubbard*, 153 Mass. 91.
>
> "The foundation of that rule is that where a question of fact depends upon the credit to be given to testimony (including the credibility to be given to the several witnesses), a judge who has seen the witnesses and heard the testimony is better able to come to the correct conclusion than the court which is called upon to review the finding on reading the testimony in print."

The evidence upon the issue here in question was squarely conflicting. The defendant testified that he and his partner were about to advertise the sale of the premises to satisfy a judgment against Landron; that Monserrat came to him with the suggestion that he should take up with Landron the transfer of the property to the defendant in satisfaction of the judgment, and in consequence of the suggestion the three met at Landron's office together with a Mr. Timson, who went there at the defendant's request; that a good deal was said at this conference, and it was finally agreed that the defendant should take a transfer of the property in satisfaction of his judgment of some eighteen hundred dollars, that he should become responsible for the mortgage indebtedness that appeared on the books of the registry as of any date prior to that of the mortgage made by Landron to Sweet and Wilcox on which the judgment had been obtained, that the purchase price which should appear in the deed should be the amount of that judgment; that nothing was said about a mortgage of seventeen hundred dollars ($1700) nor was there anything said to lead him to suspect that there was any other mortgage indebtedness except the mortgage to the bank for $4600, and further that the agreement should be reduced to writing (r. pp. 51, 52).

The defendant further testified that the first time he heard of the existence of a mortgage for $1700 was several weeks after the deed of purchase and sale was executed to him, and, further, that "when I went to sign the deed of sale under which I took over the property in question from Mr. Landron, I took the document which was handed me by Mr. Monserrat

and glanced at the first part of it very hastily. I was in a hurry. The agreement under which it was to be drawn up had been entered into only a day or two before, at which Mr. Monserrat was present, and in the discussion of which he took part, and he assured me on my asking him that it was all right. I asked him if it was drawn up in accordance with the agreement that we had made with Mr. Landron, and he stated to me that it was, and thereupon, without reading the document further, I took the pen which he handed me and signed it. Mr. Landron was not present" (r. p. 51).

There is thus presented the usual flimsy statement of a party dishonestly attempting to evade a written obligation—that he didn't read it because he was in too much of a hurry, and because assured by another that the document was all right. It is important in this connection to note that the defendant is a lawyer and was appreciative of the importance of reading agreements before signing them, and that he fails to disclose any exigency so important as to prevent his utilizing a few seconds in glancing at the subdivision entitled "Liens" in the agreement which recited the existence of the $4600 mortgage, the fact of its record, and the existence of the $1700 mortgage, and the fact that it was not recorded. The Circuit Court of Appeals did not consider these discrediting circumstances as of sufficient importance to either consider or mention.

Moreover, entirely discrediting the defendant's testimony referred to, the defendant under oath, in the third paragraph of his answer filed July 20, 1914, claimed that in fact he did not purchase the property, and that he took the title as part of an arrangement to

sell it and without obligating himself to pay even the $4600 mortgage, alleging that the deed of purchase and sale was made to him "only for the purpose of guaranteeing to defendant and his law partner Willis Sweet a certain sum of money owed them by the said Lopez Landron and at the suggestion and insistence of the plaintiff in this action, through its president, Damian Monserrat y Simo who claimed that said bank had a prior unpaid mortgage on said property, with the understanding that defendant should endeavor to sell the property for a sum that would pay the bank its claim as well as that of defendant and the said Willis Sweet, and the defendant, even with the agreement above stated, denies that he obligated himself at any time to pay the amount due the said bank by Lopez Landron" (r. pp. 5, 6).

In his cross-bill, also under oath, filed the same day defendant alleged that "cross complainant agreed to take over the said property not as the real owner of the same nor to become responsible for the payment of the *debts* of the said Landron with which said property was charged, holding priority over his mortgage and that of Willis Sweet, but rather as an *agent* to sell the same with the assistance of the said bank in order that the amount might be realized sufficient to pay off the bank's prior mortgage and that of Sweet and Wilcox" (r. p. 8).

On July 5, 1916, the defendant, varying his oath by the exigencies of his case, and admitting only a portion of the truth, admits his lack of credibility in the past by alleging, with reference to the oral agreement, "that an agreement was made to the effect that this defendant would assume the payment of the said mort-

gage for the sum of $4600 and cancel his said judgment and decree and that the said Landron for himself and wife agreed to deed said property . . . to defendant; the consideration being the assumption of said debt of $4600 besides the interest and full satisfaction of his own debt" (r. p. 18).

This documentary proof of the defendant's lack of credibility in the opinion of the Circuit Court of Appeals was unworthy of consideration or even mention. The fact that the amended answer was the result of and followed the order of the Court dismissing the answer for insufficiency entered January 28, 1916, is not without significance as showing that the defendant's oath and recollection varied with his needs, and are not dependable.

The defendant's testimony is further discredited by the fact that he paid on August 9, 1913 (r. p. 50), $252, four months' interest on the mortgages from December 3, 1912, to April 3, 1913, at the rate reserved by the mortgages, 1 per cent per month (r. pp. 80, 81, 83, 84). The interest on $4600 for the same time would be $184. The payment appears on the books of the bank (r. p. 49) and the treasurer testified that "Mr. Wilcox paid the sum of $252 as interest on the sum of $6300 for four months, for which a receipt was issued to him. No interest has since been paid" (r. p. 50).

The defendant admits making the payment, does not remember the date, admits receiving the bill for the interest, and says "when the bill for the interest was sent to me it seemed to me that it was very high. I concluded that Mr. Landron must have left several quarters of interest unpaid and the bank was trying to collect some of his unpaid interest out of me. How-

ever, I decided to look the matter up carefully, which I did, and ascertained then for the first time that there was a purported mortgage for Seventeen Hundred Dollars ($1700), and after that I refused to pay any further interest." He testifies that this payment was made "within a month or so after" January 14, 1913 (r. p. 53).

This shady explanation is completely disproved by the fact that, although a lawyer, he made no demand for reformation or cancellation of the deed and brought no suit, but waited until a bill to foreclose was brought June 9, 1914, and then by answer under oath set up the claim that the deed at the suggestion of Monserrat "was only made for the purpose of guaranteeing to defendant and Sweet" the amount of their judgment, with the understanding that defendant should endeavor to sell the property for the benefit of both plaintiff and defendant, and denying that defendant "obligated himself at any time to pay the amount due the said bank by Lopez Landron" (r. pp. 5, 6), and alleging that "said sale was made with the consent and at the suggestion of said plaintiff only for the purpose above stated" (r. p. 6).

It is further significant that the defendant could not have concluded that Landron had left "several quarters of interest unpaid," because two unpaid quarters of interest on the mortgage of $4600 would have been $368, and, further, the receipt he took was for "the sum of $252 as interest on the sum of $6300 for four months" (r. p. 50). This payment of interest in accordance with the terms of the deed of purchase and sale, supported by documentary evidence and met only by the statement of a lawyer whose credibility is dis-

proved by his written affidavits, was not in the opinion of the Circuit Court of Appeals worthy of consideration or mention.

Furthermore, on the 13th day of January, 1913, the day before the deed of purchase and sale was executed, the defendant and Wilcox executed an agreement which was drawn by the defendant, whereby Landron contracted to sell the premises to the defendant in consideration of the cancelling of the judgment in favor of the defendant and Sweet, and which recited that "It is further agreed that the said Wilcox shall assume the *encumbrances* now existing against said property which are duly registered in the Registry of Property which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet and Wilcox" (r. pp. 52, 53).

The mortgage of $1700 was dated December 3, 1912 (r. p. 83); the mortgage to the defendant and Sweet was dated June 12, 1912 (r. p. 27). The defendant admits that he never showed this agreement to Mr. Monserrat (r. p. 54), and Mr. Monserrat testified that he was not present when it was drawn and that he never saw it before the trial of the case (r. p. 58).

The agreement of Wilcox to assume "the encumbrances now existing against the said property" expresses the understanding of the parties that there was more than one encumbrance, and the only encumbrances disclosed by the evidence are the two mortgages to the bank. The description of the encumbrances assumed by the defendant as those "which are duly registered in the Registry of Property which bear a date prior to that of the mortgage" given to the de-

fendant and Sweet, is due to the fact that Landron understood that these mortgages were recorded (r. p. 61), and Wilcox, who drafted the agreement, presumably got his information from Landron. The natural infirmity of the defendant's recollection is indicated by his testimony that this agreement refers to the first mortgage and states the *amount* (r. p. 55).

A little later in the argument we will point out the great disproportionate importance which the Circuit Court of Appeals attached to the agreement of January 13th and the action of the District Court with reference to it.

One Timpson, a witness called by the defendant, testified that he was present at a conference in Landron's office between the defendant, Monserrat and Landron; that he understood Spanish better than English; that some of the conversation was in English; that he knew what his impression was of what occurred that day, but whether he got the entire facts that day or a few days afterwards he was unable to say; that it may have been that he got some information at the office and the rest of it from Mr. Wilcox upon returning to his office; that it was his recollection that the agreement referred to a mortgage for $4600 or $4700 (r. p. 56); and on cross-examination he testified that he was not certain he heard the amount mentioned at the conference or at the office of Wilcox after he returned to it; that he did not pay much attention to the conversation at the office of Mr. Landron; that there were two or three people there; that he got the impression at that time and afterwards that what appears in the agreement of January 13th was what was agreed upon at the office, and that at the office he understood the amount was $4700 and

doesn't recall hearing any amounts other than $4600 or $4700 mentioned (r. p. 57).

The testimony of this witness was too vague and indefinite to be of any value.

Mr. Monserrat testified that he did not recall having been present at Mr. Landron's office with the defendant, Landron and Timpson; that the deed of purchase and sale was drawn in accordance with instructions which the defendant gave him and which he noted at the time; that he drew up the document accordingly to be executed on the following day; that the defendant executed the agreement on the following day after reading it and stating that it was all right; that many times the defendant came to the witness and asked that the bank should wait for the interest; that the defendant did not pay the taxes, although he collected and did not account for the rent; that the defendant was furnished with a copy of the deed and the defendant admitted receiving it (r. pp. 58, 59), and never made any complaint with regard to the $1700 mortgage, but on the contrary expressed gratitude for the accommodation which the bank gave him in the payment of interest (r. pp. 58, 59). The witness also testified that after the defendant read the deed the witness read it to the witnesses to the deed and to Wilcox (r. p. 60).

Landron, a witness called for the plaintiff, testified that the house had more than thirty-one apartments or rooms; that he told the defendant the house was worth more than $13,000 and that it was assessed in the treasury department at $13,000 (r. p. 61); and further that the mortgage for $1700 was made up largely of arrears of interest due and unpaid on the mortgage for $4600,

but a part of it was additional loans (r. p. 61). The witness further testified that the agreement with the defendant was that the defendant took the property subject to both mortgages to the bank in settlement of the claim of Sweet and Wilcox against the witness (r. pp. 60, 61). The defendant being recalled testified that "the estimate of the value of the property placed upon it by Mr. Landron is too high I would say, judging from what I have been offered for the property" (r. p. 63).

The Circuit Court of Appeals attaches no importance to the improbability that the defendant executed the agreement without reading it, no importance to his assertion under oath in his original answer and cross-bill that he took over the property merely as an agent to sell the same without becoming obligated to pay to the bank other than from the proceeds of the sale, no importance to the fact that he made a payment to the bank of the exact amount of the four months' interest on both mortgages in accordance with the deed of sale, no importance to the fact that his explanation of the reason for making this payment is inconsistent with any view of the situation which could be taken, no importance to the fact that his claim of fraud is discredited by the absence of any action on his part to have the deed rescinded or his obligation avoided after learning, as he claimed, of the fraud which had been perpetrated on him, and no importance to the fact that the agreement which he himself drew up with Landron on January 13th indicated that more than one mortgage was assumed by the defendant, and arrives at its conclusion without indicating the slightest appreciation of the significance which the law justly attaches to the execution by a person *sui juris* of a written agreement,

and the weight which an appellate court is justly bound to give to the decision of a trial Court conversant with local conditions and environment and having some acquaintance with and knowledge of the members of the bar who were witnesses before them. The reasoning in the opinion of the Circuit Court of Appeals is fallacious. In the opinion, at page 96, the Court says:

> "The plaintiff did not call the witnesses to the deed to testify but did call Landron, who testified that while he remembered that Wilcox came to his office to talk about the settlement he did not remember that Monserrat, Senior, was there with him at that time; that he signed the document that had been agreed upon, drawn up, as he supposed, by Wilcox and brought to him by an American whose name he did not know but who used to attend to some business for Wilcox. His testimony was inaccurate and confused as to the details of the different transactions and he gave no testimony as to whether at the time the deed was signed it was read over by Wilcox or by Monserrat, Senior, the notary, in the presence of Wilcox."

It is pertinent to reply that the witnesses to the deed were witnesses to it in its entirety, to the parts imposing obligations upon Landron as well as to the parts imposing obligations on the defendant. "The plaintiff did not call the witnesses to the deed to testify," *but neither did the defendant.* "Landron's testimony was inaccurate and confused as to the details of the different transactions." We challenge this statement *in toto.* A reading of that testimony at pages 60 and 61 confirms the statement of the witness that he remem-

bered "the main features of the transaction but not the minor details, which on account of the lapse of time I am not able to recollect. I paid the debt by giving Mr. Wilcox the house and he assumed charge of the mortgages. The property was subject to the mortgages which had been constituted thereon by me, one first mortgage for $4600, to the best of my recollection, which had been standing for some years back. . . . I gave the second mortgage to the bank of $1700. a long time before the deal with Wilcox. . . . Made up largely of arrears of interest unpaid and due on the mortgage of $4600. A part of the $1700. was taken in money the exact amount of which I do not remember" (r. pp. 60, 61).

The witness proceeds to state a recollection almost positive that the defendant came to his office twice to talk about the matter, saying that after four years it is impossible to remember whether once or twice (r. p. 61). The witness agreed either with Mr. Wilcox or Mr. Pettingill to give the house to the defendant in payment of what he owed him, Wilcox to assume the mortgages for $4600 and $1700, and understood that both of those mortgages had been recorded. The witness testified that the property was assessed at $13,000; that he told the defendant that it was worth more than $13,000; that it had more than thirty-one apartments or rooms, and that the witness had spent therein a large fortune (r. p. 61).

It was the testimony of Frederic C. Timpson, a witness called by the defendant, on page 56 of the record, which was inaccurate, confused and merely a repetition of self-serving statements of the defendant made in the absence of the plaintiff and of Monserrat.

The Circuit Court of Appeals then says, at page 96:

> "The written memorandum of January 13, 1913, was offered in evidence by the defendant and was excluded subject to exception, but was permitted to be read. Why this document was excluded and why its contents were permitted to be read into the record is not entirely clear. It surely was competent evidence to be considered together with other proof upon the question of fraud. Whether any weight was given to it as evidence we have no way of ascertaining. The reasonable conclusion would seem to be that, having excluded it, the court gave it no weight but allowed it to be read into the record to show the nature of the agreement in case its exclusion might subsequently be brought in question."

A reference to Equity Rule 46 and to *Blease* v. *Garlington*, 92 U.S. 1, will make it entirely clear why the contents of the memorandum of January 13, 1913, was read into the record although the document itself was excluded. Probably the District Court excluded the document on the ground that it was so ambiguous as to be of little value in dealing with the credibility of the witnesses. It certainly did not affect the credibility of Monserrat, because, as testified by Monserrat as well as by the defendant, it had never been called to his attention (r. pp. 54, 58).

The Circuit Court of Appeals, however, proceeds as follows, on page 96:

> "It was an important piece of testimony upon the question of fraud and should have been received. It showed that Wilcox had agreed with

> Landron to assume the mortgage given to the bank which was duly registered and bore a date prior to the defendant's mortgage, and that Landron, in case he did not repurchase the property, was to pay as rental, for the time he occupied the premises, the amount of the interest upon the mortgage held by the bank. That this was their agreement seems to be clearly established."

On the contrary, it shows that the defendant had agreed with Landron to assume more than one mortgage and the description of the mortgages assumed as those given and recorded prior to the defendant's mortgage was a mistaken one. Landron testifies that the defendant orally agreed to assume both mortgages (r. pp. 60, 61), Monserrat testifies that he was so instructed by the defendant (r. p. 58), and the defendant then drafts the agreement of January 13th, intended, as he now admits, to bind him to assume at least one of the mortgages, and refers to them as "encumbrances now existing against the said property," following with a description applicable to one and inapplicable to the other (r. p. 53).

The Circuit Court of Appeals then proceeds, at pages 96 and 97:

> "And the question is, if we assume that Monserrat, as he testified, received his information as to the terms of the agreement from Wilcox, whether it is reasonably probable that Wilcox, having made the agreement that he did with Landron, could have told Monserrat that he had agreed to assume, not only the $4600 mortgage held by the bank, but also the $1700 mortgage, or that he

read the deed or the provision in it binding him to pay the $1700 mortgage, or that the deed was read to him by Monserrat. What was he to gain by entering into such a transaction? He held a mortgage upon the property that ante-dated the $1700 mortgage, upon which he had obtained a judgment of foreclosure and the property had been advertised for sale on the fifth of the following month, when the equity of Landron would be extinguished. He stood to lose, not to gain, by making such an agreement, and the reasonable inference is that he did not do so."

A more careful analysis of the evidence would have led the Circuit Court to propound different questions and to a different result. Is it reasonable to assume that Landron agreed to sell a property assessed at a valuation of $13,000, and which he believed to be worth more than $13,000, for the amount of the $4600 mortgage held by the bank and for the judgment claim of less than $1800 without any release from his liability on the $1700 mortgage? What was he to gain by entering into such a transaction? Such a transaction on his part was certain loss. Landron testifies that in his opinion the property was worth more than $13,000 (r. p. 61). Wilcox testifies that in his opinion it was worth less (r. p. 62). The value of the property, then, according to the test applied by the Circuit Court of Appeals, was the basis of its decision, and if that be so, turned on the credibility of Landron. The defendant, however, unlike Landron, did have a chance to gain, because he got an absolute title to this property at a cost of $7832.25 under the deed of purchase and sale (r. p. 32).

The Circuit Court of Appeals then proceeds to deal with the motives of Monserrat in a manner which would indicate that the burden of proving fraud and the presumption of innocence is in this case a matter of negligible importance:

> "But the interest of Monserrat, Senior, in the transaction was quite different. He was the president of the bank that held the $1700 mortgage; he had been largely instrumental in making the loan from the bank to Landron, and he was individually interested in the welfare of the bank, being a stockholder in it; and it seems to us that the evidence, when taken as a whole, demonstrates that he purposely concealed from Wilcox the fact that the deed obligated him to pay the $1700 mortgage, and that the court below erred in finding that Wilcox was responsible for and bound to pay the sum called for by that mortgage" (r. p. 97).

But Monserrat had only an indirect and very slight pecuniary interest as a stockholder. And Wilcox had a direct personal interest for the full amount involved.

There was not in the case a particle of evidence that Monserrat had been largely instrumental in making the loan to Landron. Because Monserrat was the president of the bank that held the mortgage for $1700, and had stock in the bank, the Circuit Court of Appeals jumps to the conclusion that the evidence taken as a whole demonstrates that he purposely concealed from the defendant the fact that the deed obligated him to pay that mortgage.

III.

The Circuit Court of Appeals erred in ruling that the deed of purchase and sale was a nullity on the ground that Monserrat, the notary who authorized the same, was disqualified to act by reason of his official relation to the plaintiff and his interest as a stockholder.

Section 20 of the Notarial Law of Porto Rico of March 8, 1906 (section 1998 of the Compilation of 1911), provides as follows:

> "The following public instruments shall be null and void;
>
> "First. Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.
>
> "Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument are witnesses thereto."

Mr. Monserrat, the notary who authorized the deed of purchase and sale, was the president of the plaintiff and a stockholder (r. p. 50).

The deed from Landron to the defendant recites that the property is subject to the $4600 and $1700 mortgages to the plaintiff (r. pp. 30, 31), and contains the provisions (r. pp. 31, 32):

> "Fifth. The parties hereto further set forth, that having entered into an agreement for the purchase and sale of the above mentioned property, they carry the same into effect, subject to the following conditions.
>
> "First. Don Rafael Lopez Landron, acting in

his own behalf and as attorney in fact for his wife Dona Ana Maria Gutierrez e Igaravidez, makes sale unto Mr. Elias B. Wilcox, the purchaser herein, of the property described in clause number one of the Statement, which sale is made in consideration of the sum of Seven thousand eight hundred and thirty two dollars and twenty five cents.

"Second. From the sum of Seven thousand eight hundred and thirty two dollars and twenty five cents, which is the purchase price, there is deducted the sum of Six thousand and three hundred dollars, which make up the capitals guaranteed by the two mortgages in favor of the Banco Popular de Economias y Prestamos, declared in clause number three of the Statement; and the purchaser binds himself to make payment of said capitals, and interest, guaranteed by said mortgages, as well as to comply with all its obligations, principal and accessory.

. . . . . .

"Fifth. The purchaser Mr. Elias B. Wilcox, as an interested party in the facts recited in clause number four of the Statement, recognizes that the same are true, and binds himself to answer to Don Rafael Lopez Landron, for any damage which he may suffer by reason of any claim arising from the mortgage constituted to guaranty the promissory notes to the order of Messrs. Sweet and Wilcox, on account of said promissory notes; for Mr. Elias B. Wilcox, the purchaser herein, takes charge of the total cancellation of said mortgage and its obligations."

The Circuit Court of Appeals deals with this question as follows in its opinion, at pages 97 and 98 of the record:

> "The plaintiff contends that it acquired no interest whatsoever under the deed by Wilcox's assumption of the mortgage indebtedness for $4600, or by his assumption of the mortgage for $1700, even if that was not brought about through fraud; and that it could at any time foreclose the mortgages either against Wilcox or Landron, as the 'right of action was always against the property and not against the person.' But this contention loses sight of the fact that, in this proceeding, the bank is not seeking simply to foreclose the rights of Wilcox in the property, but to charge him with the obligation to pay the indebtedness secured by the mortgages, and that its right to do so depends upon the validity of the deed and the provisions contained therein as to Wilcox's assumption of the indebtedness secured by the mortgages (*Ayers* v. *Wiswell*, 112 U. S. 187; *Willard* v. *Wood*, 135 U. S. 309; *Keller* v. *Ashford*, 133 U. S. 610; *Union Life Ins. Co.* v. *Hanaford*, 143 U. S. 187, 190; *Garnsey* v. *Rogers*, 47 N. Y. 233, 241), and that the bill of complaint alleges the assumption of these obligations as a ground for effecting this result. We are therefore of the opinion that the bank, if the deed was valid, would acquire an interest in Wilcox's assumption of the $4600 mortgage, and the question is whether Monserrat, Senior, the notary, by reason of his being the chief executive officer of the bank and a substantial stockholder, had such an interest as would dis-

qualify him from acting as notary in the transaction within the meaning of the Notarial Law above quoted.

"While the provisions of this law are old, being taken from the Spanish Notarial Law, no decisions of the Spanish courts construing them have been called to our attention, and it is asserted by counsel that none are to be found, for the reason that under the Notarial Law of Spain a notary could not take part in his notarial district in the administration of a bank of discount, or a brokerage establishment or any commercial or industrial company, and that a notary, not being permitted to be an executive of a bank, no occasion for a construction of the law has arisen.

"The provision of law prohibiting a notary from taking part in the administration of a bank in his notarial district is not now in force in Porto Rico, but inasmuch as it was embodied in the old Notarial Law of the Island of which Section 20 was a part, it would seem that it might be availed of in ascertaining the meaning of the section. But, however this may be, we think that Section 20 is capable of but one of two constructions; that either it means that a deed should be void if the notary before whom it was acknowledged had any interest in the transaction, however slight, or that it should be void only in case is was made to appear as a fact that his interest was sufficiently large to cause him to be biased. Opinion of the Justices, 75 N. H. 313, and cases there cited. And on either construction it seems to us the defendant must prevail, for we are of the opinion that, in-

asmuch as the notary was the president and a substantial stockholder in the bank, he had a material interest in the transaction which would disqualify him to act as notary and that the deed is a nullity."

It is submitted that in deciding this question the Court of Appeals has strayed far from the provisions of the statute under consideration.

It is a familiar rule of statutory construction that where a statute enumerates the things upon which it is to operate or forbids certain things, it is to be construed as excluding from its operation and effect all those not expressly mentioned.

> "*Expressio unius est exclusio alterius* is a universal maxim in the construction of statutes."
>
> *United States* v. *Arredondo*, 6 Peters, 691, at 725.

The question is not, as the Court of Appeals would seem to infer at pages 97 and 98 of the record, whether the bank by subrogation could enforce the defendant's obligation to Landron to pay the mortgages and whether the notary was interested in the bank either as chief executive officer or stockholder, but is whether the instrument was one "in which the notary authorizing the same has intervened as a party thereto, or which contains any provision in his favor."

The instrument in question was not one in which Monserrat or even the plaintiff bank had intervened as a party thereto nor did the deed contain any provision in favor of either of them.

The contract of a purchaser to pay the mortgage, contained in the mortgagor's deed to him, creates no

direct obligation of the purchaser to the mortgagee, and the right of the mortgagee to enforce payment of the mortgage debt against the grantee does not rest upon any contract of the grantee with the mortgagee or with the mortgagor for the benefit of the mortgagee.

Keller v. *Ashford,* 133 U.S. 610.
Bank v. *Grand Lodge,* 98 U.S. 123.
Life Ins. Co. v. *Hanford,* 143 U.S. 187.
Willard v. *Wood,* 135 U.S. 309.

In *Keller* v. *Ashford, supra,* in holding that in equity, as at law, such a contract by the purchaser to pay the mortgage creates no direct obligation from the purchaser to the mortgagee, but that the mortgagee may avail himself of the right of the mortgagor against the purchaser upon the principle that in order to avoid circuity of action a creditor may in equity have the benefit of any obligation given by the principal to the surety, the Court say, at page 621:

> "In the case at bar, the promise of Ashford was to Thompson and not to the mortgagees, and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.
>
> "In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the

mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee.''

And at page 624:

"'The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.

"'The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys so paid.

"'In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors.'"

In *Insurance Co.* v. *Hanford, supra,* the Court, by Mr. Justice Gray, say, at page 189:

"All agree that the grantee is liable to the grantor, and that, as between them, the grantee is the principal and the grantor is the surety for the payment of the mortgage debt. The chief diver-

sity of opinion has been upon the question whether the grantee does or does not assume any direct liability to the mortgagee.

"By the settled law of this court, the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. *Keller* v. *Ashford*, 133 U.S. 610; *Willard* v. *Wood*, 135 U.S. 309."

Coney v. *Winchell*, 116 U.S. 227, cited by the Court of Appeals (r. p. 94), is not authority for the proposition that the deed to the defendant created any contract between him and the plaintiff, or contained any provision in plaintiff's favor within the meaning of section 20—much less any provision in favor of its president or any or all of its shareholders.

Even if it be assumed that the deed contained a provision in favor of the bank, the Court of Appeals erred in holding that the case came within the operation of the statute on the ground that the statute meant "either that a deed should be void if the Notary before whom it was acknowledged had any interest in the matter however slight, or that it should be void only in case it was made to appear as a fact that his interest was sufficiently large to cause him to be biased" (r. p. 98).

While it is true that there are authorities to the effect that in the absence of a controlling statute a stockholder of a corporation is disqualified to take an

acknowledgment of an instrument to which the corporation is a party—

Ogden Building &c. Ass. v. *Mensh*, 196 Ill. 554;
Wilson v. *Griess*, 64 Neb. 792;
Bank v. *Bank*, 11 Wyo. 32;
Hayes v. *Southern Ass.*, 124 Ala. 663;
Southern Iron & Equipment Co. v. *Voyles*, 138 Ga. 258—

cases to the contrary are not lacking:

Read v. *Loan Co.*, 68 Ohio St. 280;
Cooper v. *Hamilton Building Co.*, 97 Tenn. 285;
Guaranty Co. v. *Lawrence*, 32 Wash. 572;
Babbitt v. *Bank*, 50 Colo. 258—

and the present situation is clearly not within the plain and explicit provisions of the Code.

It is well settled under the decisions in the various states that the fact that an officer of a corporation takes the acknowledgment of a corporate instrument will not render the acknowledgment void.

Bank v. *Rivers*, 36 Fla. 575.
Bank v. *Oberhaus*, 125 Cal. 320.
Bardsley v. *Bank*, 113 Iowa, 216.
Castetter v. *Stewart*, 70 Neb. 815.

Even if it be assumed that Monserrat was disqualified to authorize the deed by section 20, the deed was not thereby rendered a nullity as between the parties and the defendant became the owner of the property.

The Civil Code of Porto Rico contains the following provisions:

> Sec. 1184 (R.S. sec. 1184): "Public instruments are those authenticated by a notary or by a competent public official with the formalities required by law."
>
> Sec. 1191 (R.S. sec. 4297): "An instrument which is defective by reason of the incompetency of the notary or by reason of any other fault in its form shall be considered as a private instrument when signed by the parties who executed the same."
>
> Sec. 1193 (R.S. sec. 4299): "A private instrument legally acknowledged shall have with regard to those who signed it and their legal representatives, the same force as a public instrument."

(See page 43)

It is apparent from the above that the only effect of the incompetency of Monserrat as a notary would be to make the deed merely a private instrument effective as between Landron and defendant. As a private instrument the following sections excluded it from registration and rendered it ineffective to *prejudice* third parties.

Mortgage Law, art. 2 (R.S. sec. 6686):

> "The following shall be recorded in the registries mentioned in the preceding article.
>
> "First. Deeds conveying or declaring the ownership of real property or of property rights therein.
>
> "Second. Instruments constituting, recognizing, modifying or extinguishing rights of usufruct, use,

habitation, emphyteusis, mortgages, rent charges, servitudes or other real rights.

"Third. Acts or contracts under which real property or real rights are conveyed to a person. . . ."

Art. 3 (R.S. sec. 6687):

"In order to permit the record of the instruments mentioned in the foregoing article they must be embodied in a public instrument, final judgment or authentic document issued by a judicial authority, or by the Government or its agents in the form prescribed in the regulations."

Art. 23 (R.S. sec. 6707):

"The instruments mentioned in Articles 2 and 5 which are not duly recorded or entered in the registry cannot prejudice third persons."

This is emphasized by other sections of the Code:

Sec. 1221 (R.S. 4327): "A contract exists from the moment one or more persons consent to bind himself or themselves, with regard to another or others, to give something or to render some service."

Sec. 1225 (R.S. 4331): "Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use and law."

Sec. 1228 (R.S. 4334): "There is no contract unless the following requisites exist: (1) the consent of the contracting parties; (2) a definite object which may be the subject of the contract; (3) the cause for the obligation which may be established."

(The above section is contained in Chapter 2 of the Civil Code which is entitled, "Essential Requisites for the Validity of Contracts.")

Sec. 1245 (R.S. 4351): "Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist."

Sec. 1246 (R.S. 4352): "Should the law require the execution of an instrument or other special formality in order to make the obligations of a contract binding, the contracting parties may compel each other to comply with said formalities from the moment in which consent and the requirements, necessary for their validity, have taken place."

Under the above provisions of the Code it is held that contracts and transactions, the requisites for the validity of which exist under section 1228, are enforceable and valid, notwithstanding the fact that they are not embodied in public instruments.

Vazquez v. *Medina*, 17 P.R.R. 96, at 99.
Rio v. *Vazquez*, 17 P.R.R. 644.
Cintron v. *Fernandez*, 22 P.R.R. 450.

In *Cintron* v. *Fernandez, supra*, under section 1247 (R.S. 4353) providing that "The following must appear in a public instrument, (1) acts and contracts,

the object of which is the creation, transmission, modification or extinction of property rights on real property," it was claimed that a contract could not be enforced until the public instrument had been executed either voluntarily or by a Court order, but the Court held it was not necessary that an action to enforce compliance with the formalities should precede the action on the contract.

The Court say, at page 454:

"In a judgment of July 4, 1899, the Supreme Court of Spain said:

"'The effectiveness of contracts between contracting parties depends exclusively upon their validity by virtue of the existence of the essential conditions and not upon the extrinsic formalities required by law for other different purposes, therefore the parties may compel each other reciprocally to comply with the contracted obligations. Article 1279 of the said Code (section 1246 of the Revised Civil Code) ratifies that rule of law, because, foreseeing the probability that the law would require the execution of an instrument or other special formality in order that the obligations of a contract may be made effective, at all events by the party in whose favor they may have been undertaken, it does not subordinate the effectiveness of the contract to the existence of that extrinsic formality, but, on the contrary, considers principally its validity in prescribing that in such a case the contracting parties, apart from the obligations contracted, are obliged to comply with that external formality or solemnity. *This does not permit of the contention that it would be lawful for the obligor to contravene the contracted*

obligations by his acts or even that an action to enforce compliance with the formalities must precede an action arising from the contract.' "

In *Rio* v. *Vazquez, supra,* the Court say, at page 651:

"The consideration of the evidence made by the trial court having been accepted, section 1228 of the Civil Code could not have been violated by said judgment, since all the requisites essential to the validity thereof appeared in the agreement which was made between the plaintiff and the defendant in regard to the manner of satisfying the debt, to wit, the consent of the parties, the true object of the contract, and the cause of the obligation, it being unnecessary in order to make it valid that the same be stated in a public document, inasmuch as according to section 1245 contracts are binding whatever may be the form in which they may have been executed, provided the essential conditions for their validity exist."

From the foregoing it is apparent that even though the deed may not have been effective as a public instrument, it was effective as between the parties, and the defendant became the owner of the property.

IV.

The Circuit Court of Appeals erred in deciding that the deed of purchase and sale was null and void and the provisions thereof unenforceable on the ground that the witnesses to the same were the clerks or servants of Monserrat, the notary authorizing the same.

The bill of complaint recited the execution of the $4600 and $1700 mortgages from Landron to the bank

and the deed from Landron to defendant, "who assumed said debts and confessed in the said deed his obligation to pay the mortgage liens imposed on the property" (r. p. 4). It then stated the amount claimed to be due. It did not waive answer under oath but called upon defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated and he was therein especially interrogated (r. p. 4).

The defendant's answer, which was under oath, after answering specifically various allegations of the bill, proceeds as follows:

> "And your orator further submits as a fact constituting a violation of law well known to the said Monserrat and to the said Landron, that at the time said Monserrat acknowledged said bill of sale or deed as a notary public the said Monserrat was the president of the Banco Popular and a heavy stockholder therein and its legal representative, and that the witnesses to the execution of said instrument were in his employ, all of which your orator submits is in violation of the law of Porto Rico; and your orator submits whether said acknowledgment does not under said law make such instrument null and void" (r. pp. 19, 20).

The plaintiff offered no evidence in denial of the above allegations and the defendant offered no evidence in support thereof. The Circuit Court of Appeals held that the above allegations of the answer must be taken as true, and that the deed was null and void for the reason that the witnesses were the clerks or servants of the notary, dealing with the question as follows, at page 98 of the record:

"In the amended answer, which was under oath, the defendant has alleged as a fact that the witnesses to the execution of the deed were in the employ of Monserrat, the notary. The Bill of Complaint did not waive an answer under oath, and called upon the defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated and he was therein especially interrogated. The plaintiff offered no evidence whatever in denial of those allegations. It is a rule in chancery practice that, when an answer is under oath, such parts of it as are responsive to the bill are evidence equal to the testimony of one credible witness and are, therefore, to be taken as true, unless outweighed by a preponderance of evidence. Kennedy v. Custer, 147 Fed. 972; Jacobs v. Van Sickle, 127 Fed. 62; Campbell v. Northwest Eckington Co., 229 U.S. 561, 574, 579; Vigel v. Hopp, 104 U.S. 441; Clark's Executors v. Van Riemsdyke, 13 U.S. 153, 160; 1 Whitehouse Eq. Pr. Sec. 282."

But that portion of the answer did not expressly negative, nor was it directly responsive to any allegation in the bill and therefore was not evidence in favor of the defendant. The rule is that those portions of an answer under oath which expressly negative and are directly responsive to allegations in the bill are evidence in favor of the defendant, but that averments in the answer not directly responsive to such allegations are not evidence for the defendant, because the plaintiff has not called for them.

Seitz v. *Mitchell*, 94 U.S. 580.

New England Bank v. *Lewis*, 8 Pick. 113.
Bellows v. *Stone*, 18 N.H. 465.
Daniell's Chancery Practice, vol. 1, 844.

In *Seitz* v. *Mitchell*, *supra*, the bill charged that the defendant had conspired with his wife to hinder plaintiff creditor by procuring a deed of land which he purchased to be made to his wife; that the purchase money was paid by defendant from his own funds, and a deed of trust given by the wife to a third person to secure the balance of the purchase money, which deed was subsequently released by the third person to the wife. The answer denied that defendant purchased the property or paid for it or advanced money to pay for it, and denied all fraud, and further averred that the wife in her own name and for her sole and separate property purchased the land and took the deed in her own name and paid the purchase money. With regard to the effect of the answer as evidence for the defendant, the Court, by Strong, J., say, at page 82:

"The general rule of equity practice is, that when a defendant has, by his answer under oath, expressly negatived the allegations of the bill, and the testimony of one person only has affirmed what has been negatived, the court will not decree in favor of the complainant. There is then oath against oath. In such cases there must be two witnesses, or one with corroborating circumstances, to overbear the defendant's sworn answer. The reason for this is, that the complainant generally calls upon the defendant to answer on oath; and he is, therefore, bound to admit the answer, so far as he has called for it, to be *prima facie* true, and

as worthy of credit as the testimony of any other witness. This rule, however, does not extend to averments in the answer not directly responsive to the allegations of the bill, for the complainant has not called for them. It is always to be considered, therefore, when the rule is attempted to be applied, how far the averments of the answer are responsive to what is alleged in the bill. In the case before us, the defendant's answer denies that George Seitz purchased the Kendall lot, or paid for the same, or owned or advanced any money to pay for the same. So far it is responsive to the complainant's allegations. But the answer furnishes no evidence that the wife had any separate property, or any means or money of her own with which to pay the purchase-money of the lot conveyed to her."

In *New England Bank* v. *Lewis*, 8 Pick. 113, the bill alleged that the plaintiffs gave defendants notice that they were desirous of availing themselves of certain trusts in their favor and were ready and anxious to execute the trust deed. The answer alleged that the president of the plaintiffs called upon the defendant, saw the deed of trust and declined to execute it. In holding that this allegation of the answer was not evidence for the defendants, the Court say, at page 119:

"The question for the defendants to answer was whether the plaintiffs did offer to execute the trust deed; and a simple affirmative or negative would have been the proper answer. But if the defendants saw fit to go further, as they had the right to do, and aver additional matter on which they

rely in their defence, they must prove the additional matter, it being traversed by the general replication."

In *Bellows* v. *Stone, supra,* the distinction between responsive and unresponsive matter in an answer was held to be between allegations upon those subjects upon which the bill requires answer and allegations of new matter not stated or inquired of in the bill and the test was said to be whether or not the subject-matter of the allegation in the answer in question might have been omitted from the answer without furnishing the plaintiff ground of exception. The Court, by Parker, C.J., say, at pages 470, 471:

"The reason why the answer of the defendant is evidence in any particular, and stands until it is overcome by evidence, is not because it is a direct denial of the plaintiff's statement, but because the plaintiff, by calling for a response or statement by the defendant, under oath, upon a particular subject, has, in effect, thus far made the defendant a witness, and cannot be heard to say that no dependence is to be placed upon the answer he has given. Whether he call upon him to make an answer which must directly affirm or deny some statement, or whether he require him to make a statement of the facts upon a particular subject matter, the principle is the same. . . . In other words, the plaintiff, by calling upon the defendant to answer, does not make him a witness as to all the matters that he may state, but only as to those matters upon which his bill calls for a statement."

And at page 475:

> "If the whole subject matter of the statement or allegation in the answer might have been left out, then the allegations in the answer upon that subject are in no sense responsive to the bill, the bill requiring no statement upon that point. But if the omission of some statement upon that subject would furnish just ground of exception to the answer, then the statement, to the extent to which it is required, and whatever its character, whether affirmative or negative, is but a response to the requisition of the plaintiff."

Tested by the above principles it is clear that the allegation in question was not evidence for the defendant.

Nor is the allegation in the answer such a direct and positive averment of fact as to make it evidence for the defendant. The allegation is that "Your orator further *submits* as a fact constituting a violation of law," etc. This does not constitute an allegation as of the knowledge of the defendant, or even an allegation or averment upon his ~~knowledge~~ and belief; and while the allegation of this section may be good as a pleading, the form of the answer precludes its use as evidence.

Daniell's Chancery Practice (5th ed.), vol. 1, 844:

> "The denial, however, by the answer must in such cases be positive, otherwise the rule will not apply,—as where a defendant by his answer denies a fact as to his belief only, or where it is a

mere constructive denial by the filing of a traversing note."

Copeland v. *Crane*, 9 Pick. 73.
Slater v. *Maxwell*, 6 Wall. 268, 275.

In *Copeland* v. *Crane, supra*, the Court, by Wilde, J., thus states and applies the rule at page 78:

"Thomas Crane states, in his answer, that he verily believes that Copeland had received his full share of all the profits arising from the partnership concerns, and that there was a balance due to the said Crane. Now it seems quite clear that such general allegations, containing matters of belief and conclusions from facts not particularly stated, are entitled to little or no weight in a hearing on the bill and answer. The answer is only conclusive as to facts directly and particularly averred; and not as to matters of belief, unless the grounds of belief are disclosed, and are deemed sufficient."

In *Slater* v. *Maxwell, supra*, the Court, by Mr. Justice Field, say, at page 275:

"But if a fact alleged be denied upon belief merely, or be denied equivocally or evasively, it may be sustained by the testimony of a single witness."

From the foregoing it is apparent that it was not established by the allegations of the answer that the witnesses to the deed were the clerks or servants of the notary.

Moreover, for the reasons stated under the third proposition, the deed was valid as a private instrument

even though it be assumed that the witnesses were the clerks or servants of the notary.

V.

Even if it be assumed that the deed of January 14, 1913, was null and void, the decree of the District Court should not have been reversed and the bill dismissed, but a decree of foreclosure should have been granted.

After concluding that the deed was null and void for the reason that there was a provision therein in favor of the notary and also on the ground that the witnesses were his clerks or servants, the Court of Appeals held that the bill should have been dismissed, saying, at page 99 of the record:

> "The bill should have been dismissed, it having been brought against Wilcox as the owner of the equity, when in fact he was not the owner, the deed to him being a nullity, and Landron not having been made a party. *Terrell* v. *Allison*, 88 U. S. 289; Whitehouse Equity Practice, Sec. 68."

Article 129 (R.S. 6813) of the Mortgage Law provides as follows:

> "If before the creditor shall enforce his claim against the estate mortgaged the property should pass into the hands of a third possessor, all proceedings prescribed in the foregoing article should be directed against him as the person subrogated to the rights of the debtor."

Assuming for the moment that the deed was a nullity, yet the defendant was claiming title to the prop-

erty included within its terms at the time of the foreclosure proceedings and was collecting the rent (Test. of Monserrat, r. p. 58).

It is submitted that even though the deed was a nullity, the defendant was the possessor of the property under the provisions of the article above quoted and that the foreclosure proceedings were therefore properly brought against him.

VI.

The decree of the Circuit Court of Appeals cannot be sustained upon any of the grounds raised by defendant's assignments of error which were not relied upon by the Circuit Court of Appeals as grounds for its reversal of the decree of the District Court.

a. Of the above, assignments 13, 14, 15 and 16 (r. pp. 66, 67), in one form or another, allege that the District Court erred in dismissing the bill of review.

The decree dismissing the defendant's bill of review (r. p. 46) was not reviewable by the Circuit Court of Appeals.

No appeal from this decree was taken to the Circuit Court of Appeals, the only appeal taken by the defendant being the appeal from the final decree of foreclosure of August 25, 1916 (r. p. 71).

A bill of review does not constitute a part of the original cause, but is an independent proceeding.

> *Lee County* v. *Rogers*, 7 Wall. 181.
> Daniell's Chancery Practice (5th ed.), vol. 2, 1575, note 3.

It follows that as there was no appeal from the decree dismissing the bill of review, and as the bill of

review is not part of the proceedings in which the plaintiff's bill was filed, the decree of the District Court dismissing the bill of review was not reviewable by the Circuit Court of Appeals.

But even if it be assumed that the action of the District Court in dismissing the bill of review was reviewable by the Circuit Court of Appeals, the action of the District Court in dismissing the bill of review was not error.

The defendant's assignment No. 13 (r. p. 66) sets forth that after the decree of foreclosure the defendant brought an action against Landron and plaintiff to set aside the deed of January 14, 1913; that defendant had the bill dismissed as against plaintiff, one of the therein defendants, and that thereafter a final decree against Landron to the effect that the deed was null and void was rendered; that defendant thereafter filed the bill of review to reverse the decree of August 25, 1916, and that said bill of review was dismissed on plaintiff's motion which action defendant alleged to be error.

The decree against Landron referred to in this assignment was *pro confesso*, Landron not having appeared, pleaded or answered, as appears from the allegations of the bill of review (r. pp. 40, 41), he having left the island and his representation by counsel being uncertain (r. p. 47).

With respect to the defendant's course in taking a decree *pro confesso* against Landron, dismissing against the plaintiff and then using the decree of nullity obtained against Landron for the purpose of concluding the plaintiff by means of a bill of review, the District Court say, at page 47 of the record:

"2. There does not appear to have been a neces-

sity for a bill of review. In case No. 975 there could have been a consideration of all original equities between the three parties interested which could not be raised in the answer to the bill in No. 946. This seems to have been contemplated, but at the last moment the plaintiff considered that a decree pro confesso against Landron, who had left the island and whose representation by counsel was uncertain, would fix all rights in regard to the property. Thereupon the plaintiff dismissed the bill as to the bank and was left with a decree pro confesso as to Landron and relies upon it. He voluntarily gave up the opportunity to litigate the points at issue with the principal party in interest, that is, the bank, which he had by amendment eliminated. But the decree he did obtain was not binding upon the bank, because the bank was no longer a party. It does not seem equitable for a plaintiff to prosecute a bill of review to cover remedies which were obtainable in a suit which he voluntarily dismissed as to the main party in interest."

The defendant's contention on this ground of error is that although the District Court's rulings and findings in the suit between plaintiff and defendant that the deed from Landron to defendant was valid were correct, yet the plaintiff is concluded on that question by the result of a subsequent decree *pro confesso* in a subsequent suit between defendant and Landron only. It is submitted that this contention is absurd.

But if it could be held that the plaintiff could be concluded as to the nullity of the deed by a decree *pro confesso* in a suit between defendant and Landron, yet

it does not follow that the bill of review should be sustained.

The function of a bill of review is to relieve a meritorious complainant from a clear miscarriage of justice where the remedy can be applied without mischief to the rights of innocent parties and without jeopardizing the stability of judicial decrees, and is a matter of discretion and not of absolute right even where error in the decree is apparent.

Hopkins v. *Hebard*, 235 U.S. 287.
Scotten v. *Littlefield*, 235 U.S. 407.

In *Hopkins* v. *Hebard*, *supra*, it was held as stated in the head-notes:

> "Notwithstanding this court has recently decided, in an action between North Carolina and Tennessee, that the boundary between them is different from that which the Circuit Court of Appeals had previously adjudged it to be in cases affecting titles to land now owned by third parties relying on the decrees of that court, it will not now overturn those decisions, as the stability of judgments and the protection of rights acquired in reliance upon them would, under the circumstances of this case, make the review inequitable."

In the above case it was sought to review a decree entered by a District Court on the ground that said decree was plainly erroneous in view of subsequent decisions of this Court.

It would be manifestly inequitable to reopen the decree in this case on account of a decree in a subsequent suit brought by defendant against Landron in which

the plaintiff had no opportunity to be heard for the reason that defendant voluntarily took a decree of dismissal as to him.

b. Assignments 14 and 15 (r. p. 66).

These assignments appear to require no discussion.

c. Assignment 16. "The court erred in dismissing the bill of review filed herein in overruling each and every of the grounds set forth therein" (r. p. 67).

Although it is submitted that this assignment is too vague and general to require notice, the plaintiff will argue briefly thereunder a ground for review relied upon in the plaintiff's bill of review, which is as follows:

> "Your petitioner further says and respectfully urges, that your Honor erred in holding that your petitioner was liable for the payment of the mortgage of $1700 sued for by the bank in the foreclosure suit, together with interest, costs and attorney's fees provided for therein, for the reason that it was shown by the witnesses of the plaintiff bank at the hearing that the said mortgage was to cover interest due and unpaid on the first mortgage of $4600 held by the said bank against Lopez Landron, it being apparent upon the face of the bank's bill of complaint that the said mortgages drew the maximum rate of twelve per cent under the law of Porto Rico, and that the interest due on the first mortgage of $4600 held by the said bank against Lopez Landron, it being apparent upon the face of the bank's bill of complaint that the said mortgages drew the maximum rate of twelve per cent under the laws of Porto Rico and

that the interest due on the first mortgage was thereby to draw twelve per cent per annum, and that the said mortgage was a usurious contract and not collectible under the laws of Porto Rico" (r. p. 44).

This matter was not set out as a defense in the defendant's answer. As a ground of review for matters apparent on the record it is probably improper because it deals with the evidence.

Act of Legislative Assembly of Porto Rico, March 1, 1902, as amended by Act of March 12, 1903, provides as follows:

Sec. 1 (R.S. sec. 4172). "That in the absence of an agreement in writing entered into and executed at the time, the rate of interest upon the loan or forbearance of money or goods or upon any variety of obligation or contract or upon unpaid judgments, shall be at the rate of six ($6) dollars annually, on each one hundred ($100) dollars or upon its equivalent in value and at the same rate for a greater or less sum or for a longer or shorter period. Provided, however, that no rate of interest shall be fixed by special agreement in excess of twelve ($12) dollars a year on each one hundred ($100) dollars or upon its equivalent of value. Within the limit here defined it shall be lawful to discount bills and notes and other similar obligations."

Sec. 4 (R.S. sec. 4175). "No person except as authorized by Section 3 of this Act (Sec. 4174 Revised Statutes), shall demand or receive, directly or indirectly, any money or goods, at any greater

rate of interest for the loan or extension of time of said loan, than the rate provided for herein.

"Any contract wherein or whereby there is reserved, accepted, or secured or agreed to be reserved, accepted or secured any greater sum or value than is allowed by this Act, is utterly void for all purposes, in so far as the interest is concerned; and a court of competent jurisdiction in a proper action may enjoin the collection of said interest, and any proceeding to enforce such contract shall be void, in so far as it refers to the interest."

The first mortgage for $4600 was dated July 29, 1909, was made for the term of one year and carried interest at the rate of 1 per cent monthly, payable four months in advance (r. p. 81). The second mortgage to the bank for $1700 was executed December 3, 1912, for the term of one year, and the interest thereon was at the rate of 1 per cent monthly payable in advance every four months (r. p. 84).

It appeared at the trial from the evidence of the witness Fernando that the $1700 mortgage to the bank was an enlargement of the first mortgage; that it represented partly interest on the first mortgage and partly loan; that $1480.20 was interest on the first mortgage, and the difference between that and the $1700 was paid to Landron in cash (r. pp. 49, 50). The defendant's claim is that the $1700 mortgage was a method of collecting interest upon the 12 per cent interest limited by the statute and was therefore void.

The District Court disposed of this matter as follows:

"It is also set up that there was an error in the

decree because the second mortgage was void in that it covered interest upon interest. The Porto Rican law avoids the usury, not the principal. (Act March 1, 1902, Sec. e; Compilation 1911, Sec. 4175.) The new mortgage, however, is not shown to transgress any law. It purports to be for a certain additional advance plus interest then accrued. In other words, the transaction amounted to a rest, at which interest then due was figured out and not paid. In such case it ceased to be interest and became a debt which could be deferred, secured by mortgage, or handled in any other way the parties saw fit. The amount of interest is large, but does not exceed what is allowed by contract under the local law. There is no showing that there was any fraud or that any advantage was taken which calls for the interposition of a court of equity. Moreover, if there is any mistake in the amount due under the decree for foreclosure, it could have been brought up by exception or by motion questioning the amount figured by the clerk and adopted by the court. There was no need for an independent proceeding in this regard'' (r. p. 49).

The question was not discussed by the Circuit Court of Appeals. The above ruling of the District Court is in accord with the universal rule that in such cases the usury laws are not violated by the creditor's forbearing to compel payment of interest due and taking an agreement to pay the amount of interest due with interest thereon.

Camp v. *Bates,* 11 Conn. 488.
Otis v. *Lindsey,* 10 Me. 315.

Magruder v. *Bank,* 18 Ark. 9.
McGovern v. *Ins. Co.,* 109 Ill. 151.
Austin v. *Bacon,* 28 Wis. 416.
Holland v. *Mosteller,* 51 N.C. 582.
Meeker v. *Hill,* 23 Conn. 574.
Keiser v. *Decker,* 29 Neb. 92.

d. Assignments 1 to 6, inclusive (r. pp. 63, 64).

The errors charged in these assignments are the actions of the Court in granting plaintiff's motion to dismiss the defendant's original answer and the defendant's cross-bill and in denying the defendant's motion for a decree *pro confesso* on his cross-bill.

Without going into this question at length it would seem to be sufficient to call attention to the fact, as was pointed out by the Circuit Court of Appeals (r. p. 93), in holding that this ground of complaint was without merit, that neither the original answer nor the cross-bill alleged fraud with respect to the deed of January 14, 1913, and that the original answer contained no allegation with respect to the nullity of the deed, as did the cross-bill, whereas defendant's amended answer which he was allowed to file contained, among the other defenses therein, the defense of nullity of the deed and that therefore defendant could have been in no way injured by the Court's action on these motions.

e. Assignment 12 (r. p. 65).

The error alleged in this assignment is that after defendant filed his bill of review he filed a motion asking the Court to suspend the foreclosure sale under the decree of August 25, 1916, and that the motion was denied.

There is no such motion or the denial thereof in the record.

f. Assignments 18, 19 and 20 (r. p. 67).

> "18. The court erred, if the deed of January 14, 1913, Exhibit E for the plaintiff, were not null and void, in finding for the complainant as to the mortgage of $1700, with interest thereon, costs and attorney's fees.
>
> "19. If the deed, Exhibit E for the plaintiff, were not void, and if the court did not err in finding for complainant as to the mortgage of $1700 with interest thereon, costs and attorney's fees, the court erred in finding for the complainant as to the interest on the said mortgage of $1700, costs and attorney's fees.
>
> "20. The court erred in finding for the complainant as to the mortgage of $1700, interest and attorney's fees for the reason that to so find was against the weight of the evidence."

All questions which were raised by the record on the appeal to the Circuit Court of Appeals and which might be covered by these assignments have been dealt with.

The defendant, however, argued on his brief before the Circuit Court of Appeals a question which was not raised by his answer concerning the validity of the $1700 mortgage. The claim was thereby apparently intended to be made that the $1700 mortgage, being an enlargement or extension of the $4600 mortgage, could not under the provisions of the Mortgage Law be enforced against the defendant. The provisions of the

Mortgage Law in so far as they have to do with the question are as follows:

> "Art. 114 (R.S. sec. 6798): A mortgage constituted to secure a credit which earns interest shall secure with regard to third persons, in addition to the principal, only the interest for the two years last past and that part of the current year which shall have accrued.
>
> "Art. 115 (R.S. sec. 6799): After the expiration of three years from the date the loan began to draw interest which remains unpaid, the creditor may demand that the mortgage created be extended on the same mortgaged property, for the purpose of securing the interest corresponding to the first of said years, but only in case that the obligation to pay part of the interest has matured, and the debtor has failed to satisfy it.
>
> "If the creditor should avail himself of this right after the expiration of three years he may demand that the mortgage be extended to cover all the interest which at the time of making such extension may not be secured by the first mortgage; but in no case shall the mortgage created prejudice a person who had previously and after the two years acquired an interest in the mortgaged property."

It is apparent that as the defendant did not acquire his interest in the mortgaged property under his deed until long after the plaintiff's second mortgage, he is not affected by the provisions of the last sentence in article 115, which is only intended to make it clear that the new mortgage shall not make a prior purchaser

liable for interest for which he would not have been liable under article 114 if the new mortgage had not been given.

On the whole case it is evident that defendant, under the deed of January 14, 1913, became the owner of the property in question, that it was subject to plaintiff's first mortgage of $4600, which was duly recorded at the time of said sale, and to plaintiff's second mortgage for $1700, of which defendant had knowledge at the time of said transfer, both of which mortgages defendant assumed and agreed to pay and that the Court of Appeals erred in ruling and finding otherwise and in reversing the decree of the District Court.

It is therefore respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and the decree of foreclosure of the District Court affirmed with costs.

BOYD B. JONES,
PHILIP N. JONES,
Solicitors for Appellant.

Act of April 12, 1900, c. 191, 31 Stat. 84, 85:

"SEC. 34. Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court. The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters, and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said court shall be held at San Juan commencing on the second Monday in April and October of each year, and also at Ponce on the second term in January of each year, and special terms may be held at Mayaguez at such other

stated times as said judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language."

"SEC. 35. Writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the Supreme Court of the United States shall be conducted in the English language."

Sections 128, 238, 244 and 246 of the Judicial Code as originally enacted:

"SEC. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise pro-

vided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"SEC. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

"SEC. 244. Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme

Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts."

"SEC. 246. Writs of error and appeals from the final judgments and decrees of the supreme court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party

or of other competent witnesses, exceeds the sum or value of five thousand dollars."

By the Act of January 28, 1915, c. 22, sec. 2, 38 Stat. 803, sections 128 and 238 were amended by including within their provisions the United States District Court for Porto Rico.

Section 244 was repealed and section 246 was amended to read as follows:

"SEC. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the

United States within six months from the date of such judgment or decree." Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of five thousand dollars, may be taken and prosecuted in the circuit court of appeals.

A more precise translation of section 1193 would substitute the word "admitted" for the words "legally acknowledged."

Section 1193, which is the same as section 1225 of the Civil Code of Spain, as it appears in the original Spanish text is as follows:

> "Artículo 1225.—El documento privado, reconocido legalmente, tendrá el mismo valor que la escritura pública entre los que lo hubiesen suscrito y sus causahabientes."

The word "reconocido" is the past tense of the verb "reconocer," which is translated in Appletons' New Spanish-English and English-Spanish Dictionary, at p. 463, as follows:

> "Reconocer, va. (for irr. V. Conocer) to scan, scrutinise, inspect, examine closely; to recognise; to own, confess; acknowledge; to consider, to contemplate; to accept or admit; to comprehend; to conceive; (mil.) to reconnoitre, to scout; (pol.) to recognise the official existence of a country, or to sanction acts done in another land; (com.) to acknowledge.—vr. to repent; to confess one's self culpable; to judge justly of one's own self."

The decisions of the Supreme Court of Porto Rico establish this as the proper interpretation of the section.

Rivera v. *Miranda*, 10 P.R.R. 224.

In the opinion in the above case, after reciting that "under date of August 13, of the same year [1892], Miguel Miranda y Rivera, by private document, the

authenticity of which he has acknowledged, confessed that Francisco Miranda had, by order of the heirs of Rosalia Cordero, conveyed to him the deed to a tract of land which they possessed . . ." (pp. 225-226). "2.—And that Miguel Miranda acknowledged the private document of August 12, 1892" (p. 228). The Court say, at p. 233:

> "We accept as valid and efficient in law the private document executed by Miguel Miranda on August 13, 1892, because it has been acknowledged by the latter in court and, therefore, has the same legal value as a public instrument, according to article 1225 of the former Civil Code, section 1193 of the revised Code."

In *Hernandez* v. *Ortiz*, 18 P.R.R. 1012, with regard to a document which had not been acknowledged before a notary, the Court say, at p. 1016:

> "With regard to Ortiz Sainz and Oramas, the said receipt must take effect from the date on which it was made, according to section 1193 of said code, *for the document having been acknowledged by both*, it has the same force with regard to them as if it were a public instrument." (Italics ours.)

In *Cintron* v. *Sola*, 22 P.R.R. 245, of a promissory note which was not acknowledged before a notary, the Court say, at p. 250:

> "The genuineness of the note has not been impeached and must be admitted, pursuant to section 119 of the Code of Civil Procedure; and being

genuine, according to section 1193 of the Civil Code, it has the same force as a public instrument between those who may have signed or their successors in interest."

Of the instruments referred to in section 1225 of the Spanish Civil Code, which is the same as section 1193 of the Porto Rican Code, it is said in the Commentaries of Manresa Y Navarro, on the Spanish Civil Code, edition of 1907, volume 8, p. 448:

"These are the documents that the parties enter into by themselves or, at most, in the presence of witnesses but without the intervention of a public functionary who authorises them thus giving them authenticity. Also enter into this group, in accordance with what is determined in Art. 1223 of the Code, (Art. 1191 of the Porto Rican Code) to the commentary on which we refer, the defective public deeds on account of the incompetence of the notary authorizing the same or any other fault that affects exclusively the especial form of the same; always, of course, if the same have been signed by the parties, in accordance, as we have seen, with the requirements of the article referred to." (Literal translation.)

In connection with the interpretation of this section see Acts and Resolutions of the First Session of the Ninth Legislature of Porto Rico, Number 8, approved November 12, 1917.

"Section 1.—That in case of discrepancy between the English and Spanish texts of a statute passed by the Legislative Assembly of Porto Rico,

the text in which the same originated in either house, shall prevail in the construction of said statute, except in the following cases; (a) If the statute is a translation or adaptation of a Statute of the United States or of any State or Territory thereof, the English text shall be given preference over the Spanish. (b) If the Statute is of Spanish origin the Spanish text shall be preferred to the English. (c) If the matter of preference cannot be decided under the foregoing rules, the Spanish text shall prevail."

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No. 91

Supreme Court of the United States.

October Term, 1909.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
APPELLANT,
v.
ELIAS R. WILCOX,
APPELLEE.

APPEAL FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Appellant's Supplemental Brief on the Jurisdictional Question.

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October Term, 1920.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P.R.,
Appellant,
v.
ELIAS B. WILCOX,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Appellant's Supplemental Brief on the Jurisdictional Question.

STATEMENT OF THE CASE.

This is an equity appeal from a final decree (r. p. 99) of the Circuit Court of Appeals for the First Circuit reversing the final decree (r. p. 34) of the District Court of the United States for the District of Porto Rico, which ordered the appellee (hereinafter referred to as the defendant) to pay to the appellant (hereinafter referred to as the plaintiff) $9631.92, the amount due on two mortgages of real estate in Porto Rico, the unpaid principal of which amounted to $6300, and directed in default of such payment a foreclosure of the

mortgages by sale, thus establishing a personal liability of the defendant for said indebtedness which could be enforced as to any deficiency by suit against him.

Coney v. *Winchell*, 116 U.S. 227, 230.

The jurisdiction of the District Court is based wholly upon the facts, alleged in the bill (r. p. 2) and admitted by the answer (r. p. 17), that the defendant is a citizen of the United States and that the matter in dispute exceeds the sum of $1000.

The jurisdictional question is not free from difficulty, and the appellant wishes to consider the statutes and decisions involved with greater care than has been exercised in the preparation of the brief heretofore filed.

ARGUMENT.

The appeal from the District Court to the Court of Appeals was allowed on the 24th day of February, 1917 (r. p. 71), and the allowance of the appeal from the Circuit Court of Appeals to the Supreme Court was on the 27th day of February, 1919 (r. p. 99). The jurisdiction of these Courts of this case under the statutes then in force was continued by the Act of March 2, 1917, c. 145, secs. 40, 45.

By the Act of April 12, 1900, c. 191, sec. 34 (31 Stat. 84), called the "Foraker Act," and by the Amendatory Act of March 2, 1901, c. 112, sec. 3 (31 Stat. 953), the District Court was given the ordinary jurisdiction of District and Circuit Courts of the United States, thus including controversies "between citizens of different states in which the matter in dispute exceeds" $2000; controversies "between citizens of a state and foreign state citizens or subjects" involving a like amount;

and of all controversies "where the parties or either of them are citizens of the United States or citizens or subjects of a foreign state or states wherein the matter in dispute exceeds . . . the sum or value of $1000."

Section 34 of the "Foraker Act" is as follows:

> *"Sec. 34. Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court. The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said court shall be held at San Juan*

commencing on the second Monday in April and October of each year, and also at Ponce on the second term in January of each year, and special terms may be held at Mayaguez at such other stated times as said judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language."

Section 3 of the Act of March 2, 1901, is as follows:

"Sec. 3. That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states wherein the matter in dispute exceeds exclusive of interests or costs the sum or value of one thousand dollars."

Section 241 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087) confers jurisdiction on the Supreme Court to review on appeal all judgments of the Circuit Court of Appeals which are not made final by the provisions of that chapter. That section is as follows:

"Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. (36 Stat. L. 1157)."

Section 128 of the Judicial Code, as amended by the Act of January 28, 1915 (38 Stat. 803), c. 22, sec. 2, enumerates the cases wherein the decrees of the Circuit Court of Appeals are made final, and is as follows:

> *"Sec. 128. The circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court of Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trademark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."*

Sections 239 and 240 relate to certificates by the Circuit Court of Appeals and to certiorari.

The suit at bar is not included in this enumeration, for it is between a corporation created by the laws of Porto Rico and a citizen of that territory and a citizen of the United States resident in Porto Rico. The plaintiff is a citizen of Porto Rico—

Martinez v. *La Asociacion De Senoras*, 213 U.S. 20;
Barrow Steamship Co. v. *Kane*, 170 U.S. 100—

and neither a citizen of a foreign country—

De Lima v. *Bidwell*, 182 U.S. 1;
Porto Rico v. *Castillo*, 227 U.S. 270—

nor a citizen of a state—

Barney v. *Baltimore*, 6 Wall. 280.

Section 241 is so explicit in granting a right of appeal in all cases in which the decree of the Court of Appeals is not made final and section 128 is so definite in the enumeration of those cases in which such appeal is made final that this case, not within that enumeration, is brought within the principle enunciated in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, at page 37:

> "'*It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.*' *Scott* v. *Reid*, 10 Pet. 524, 527."

The question is purely one of construction, and the plain language of the statutes is not controlled by any of the considerations urged in the brief of the appellee.

The appellee contends at page 14 of his brief that the District Court for Porto Rico since its organization has been governed as to its jurisdiction by special legislation of Congress.

But, as we have seen, section 34 of the "Foraker Act" gave that Court the "*ordinary jurisdiction*" of District and Circuit Courts of the United States, and section third of the Act of March 2, 1901, merely extended that jurisdiction to include cases involving more than $1000 wherein either of the parties was a citizen of the United States or an alien.

The Act of March 2, 1917, c. 145, sec. 41 (39 Stat. 965), with reference to the District Court of the United States for Porto Rico, now provides that—

> "*Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner. In addition said district court shall have jurisdiction for the naturalization of aliens and Porto Ricans, and for this purpose residence in Porto Rico shall be counted in the same manner as residence elsewhere in the United States. Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of*

the parties on either side of such separable controversy are citizens or subjects of the character aforesaid: Provided, That nothing in this Act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all controversies pending in said court at the date of the approval of this Act."

It thus appears that the special legislation referred to by the appellee has throughout given to the District Court for Porto Rico "jurisdiction of all cases cognizable in the District Courts of the United States" with a like procedure, and has extended that jurisdiction with like procedure in the first instance to certain cases where all of the parties on either side of the controversy are citizens of the United States or aliens with the later domicillary and value limitations.

The appellee contends at page 15 of his brief that the statutes concerning the appellate review of the decisions of the District Court for Porto Rico were of a special nature differing from those governing the review of decisions of any other District Court.

On the contrary, by the Judicial Code and its amendments, not only was the case at bar put within the jurisdiction of the District Court for Porto Rico, but the decisions of that Court have been made subject to the *same* review by the Circuit Court of Appeals and the decisions of the Circuit Court of Appeals have been made subject to the same review by the Supreme Court as in cases arising in the District Courts of the United States. Section 35 of the "Foraker Act" provided—

"That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied."

The appellate jurisdiction thus conferred by reference to the Supreme Courts was in all cases involving an amount exceeding $5000 as well as in cases involving federal laws and treaties, Act of March 3, 1885 (23 Stat. 443). This statute is as follows:

"Be it enacted, &c. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

. . . . . .

"Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copy-right or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United

States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

These provisions were re-enacted by section 244 of the Judicial Code, which is as follows:

"Writs of error and appeals from the final judgments and decrees of the Supreme Court of and the United States District Court for Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States or wherein the Constitution of the United States or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied without regard to the sum or value in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the District Courts."

This section was repealed, and the appellate supervision of the Court again changed by the Act of January 28, 1915 (38 Stat. 803). This Act amended sec-

tions 128 and 238 of the Judicial Code to read as follows:

"Sec. 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and except as provided in sections two hundred and thirty-nine (relating to certified questions) and two hundred and forty (relating to certiorari) the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trademark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"Sec. 238. Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final

sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

And the jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals in cases originating in the United States District Court for Porto Rico was of course defined by section 241 of the Judicial Code, which for convenience in this connection we again recite:

"Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. (36 Stat. L. 1157)."

The contention at page 28 of the appellee's brief that the Act of March 2, 1917, indicates the intention of Congress to give an appeal either directly to the Supreme Court of the United States from the District Court or to the Circuit Court of Appeals, and to give no other appeal.

This contention is based upon the assumption that no appeal lies in the case at bar from the District Court to the Circuit Court of Appeals, and to support

that assumption the appellee appeals to sections 42 and 43 of the Act referred to.

Section 42 contains the provision that—

> *"The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said Circuit Court of Appeals in all cases where the same would lie from any District Court to a Circuit Court of Appeals of the United States, and with the right of appeals and review directly by the Supreme Court of the United States in all cases where a direct appeal would lie from such district courts."*

Section 43 provides—

> *"That writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States as now provided by law"* (39 Stat. 966).

The repealing clause of the Act of March 2, 1917, is section 58, which reads as follows:

> *"That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs and duties on importations into Porto Rico prescribed by the Act of Congress entitled 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes' approved April 12, 1900, are*

that the judgment of the Circuit Court of Appeals was not reviewable.

In *American Security Company* v. *District of Columbia*, 224 U.S. 491, the jurisdiction of the Supreme Court to review a final judgment of the Circuit Court of Appeals of the District of Columbia depended upon the construction of the sixth clause of section 250 of the Code, giving such jurisdiction "in cases in which the construction of any law of the United States is drawn in question by the defendant," and it was decided that a purely local law relating to the District of Columbia was not within the meaning of that section.

In *Inter-Island Steam Navigation Company* v. *Ward*, 242 U.S. 1, the jurisdiction conferred on this Court by section ~~241~~ of the Judicial Code as originally enacted to review the final judgments of the territorial Supreme Court in all cases involving more than $5000 had been transferred by the Act of January 28, 1915, amending section 246 of the Code (38 Stat. 804), to the Circuit Court of Appeals, and it was attempted to support the appellate jurisdiction of this Court under section 241 of the Code on the ground that the case was one of those in which the decree of the Court of Appeals was not made final by section 128 of the Code. This Court held that section ~~250~~ was inapplicable, putting its decision upon the ground that "the Supreme Courts of Hawaii and of Porto Rico were not left to be controlled by the law generally applicable to courts of the United States," and that "as the remedy intended to be afforded by the amendment of 1915 was evidently the restricting of the jurisdiction

of this court to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish."

But, as has been pointed out, the District Court of Porto Rico, appeals therefrom, and the procedure therein, have throughout been controlled by the law generally applicable to District Courts of the United States, and at no time has this Court had jurisdiction on direct appeal of cases as such wherein one of the parties was a citizen of the United States and the jurisdictional amount was anything in excess of $1000.

It may be of some service in this connection to point out the legislation affecting the jurisdiction of the territorial Supreme Court and appeals therefrom, which differentiated them from District Courts and appeals from such Courts.

The Act of April 30, 1900, c. 339 (31 Stat. 141), established by section 81 the Supreme Court of Hawaii, and created by section 86 the District Court for Hawaii as a "federal court" with the ordinary jurisdiction of District and Circuit Courts of the United States.

By the provision in section 86 that "the laws of United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii," jurisdiction was given to the Supreme Court of the United States to review the judgments and decrees of the territorial Supreme Court in the cases enumerated in Re-

vised Statutes, sec. 709 (re-enacted as section 237 of the Judicial Code), *i.e.*, those involving constitutional and treaty questions regardless of the amount.

Equitable Life Assurance Society v. *Brown*, 187 U.S. 308.

The Act of 1900 does not give to the Circuit Court of Appeals jurisdiction to review the judgment of the territorial Supreme Court either in terms or by reference to section 15 of the Act of March 3, 1891, establishing the Circuit Court of Appeals, and any implication to the contrary is negatived by section 86 of the Act of 1900 giving to the Circuit Court of Appeals in the ninth circuit the appellate jurisdiction of the District Court generally exercised by the Circuit Courts of Appeals.

Ex Parte Wilders Steamship Co., 183 U.S. 545.

Section 6 of the Circuit Court of Appeals Act, therefore, did not apply to appeals from the territorial Supreme Court. In section 6, after enumeration of the cases in which the decrees of the Circuit Court of Appeals Act shall be final, occurs the provision that "in all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000 besides costs."

Section 241 is a re-enactment of this provision, and is merely declaratory of the then existing law.

The Acts of March 3, 1905, c. 1465, sec. 3 (33 Stat. 1035), and March 3, 1909, c. 269 (35 Stat. 838),

amended section 86 of the Act of April 30, 1900, by a proviso "that writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved exclusive of costs exceeds the sum or value of $5000."

The Judicial Code as originally enacted continued to differentiate between the District Courts of the United States, including that of Hawaii, and the Supreme Court of Hawaii, dealing with the former by provisions generally applicable to them all and dealing with the territorial Supreme Court by special sections of the Code.

Section 246 of the Code dealt only with appeals from the territorial Supreme Court to this Court, and was a re-enactment of the statutes which have been referred to in that connection.

Section 128 of the Code as originally enacted was a re-enactment of the statutes giving the Circuit Courts of Appeals appellate jurisdiction of the District Courts, including the United States District Court for Hawaii, and a re-enactment of the enumeration of the cases in which the decrees of the Circuit Courts of Appeals should be final.

Section 238 was a re-enactment of preceding legislation providing for appeals and writs of error from the District Courts of the United States, including that for Hawaii, direct to the Supreme Court, with the exception that appellate jurisdiction in cases of a conviction of a capital crime was transferred from the Supreme Court to the Circuit Courts of Appeals.

As has been pointed out, section 241 was a re-enactment of the provision in section 6 of the Circuit Court

of Appeals Act giving a right of appeal to the Supreme Court of the United States in all cases where the matter in controversy exceeds $1000 in which the judgment or decree of the Circuit Court of Appeals is not made final by section 128 of the Code, which is also a re-enactment of the provisions of section 6 of the Circuit Court of Appeals Act, enumerating the cases in which the review of District Court decisions by the Court of Appeals is made final.

By the Act of January 28, 1915, section 244 was repealed and section 246 was amended so that writs of error and appeals from the Supreme Court of Hawaii could be taken direct to the Supreme Court of the United States as in state cases, and a jurisdiction of the Supreme Court in cases involving $5000 or more was transferred *en bloc* to the Circuit Court of Appeals.

It is apparent from this review of the legislation that the provisions of sections 128 and 241, giving a right of appeal to this Court from all decrees of the Circuit Court of Appeals which are not made final by the enumeration contained in section 128, have no reference to appeals from the Supreme Court of Hawaii, and constitute an explicit declaration by Congress of a right of appeal to the Supreme Court in the case at bar.

Any suggestion that there is no reason other than the letter of the statutes for giving an appeal to the Supreme Court in the case at bar and making the decree of the Circuit Court of Appeals final in cases of diversity of citizenship and cases arising under the laws enumerated in section 128 is met by the fact that the distribution of appellate jurisdiction is governed

by the letter of the statute, and not by the importance of the cases dealt with. Thus an appeal lies in all cases to enforce the statutory liability of shareholders in national banks (*Kerbly* v. *Springfield Inst. for Savings*, 245 U.S. 330), although there are many cases arising under the revenue and patent laws of the United States of equal or greater importance wherein the decrees of the Circuit Court of Appeals are final.

The adherence of this Court to the letter of the statutes involved is strikingly marked by the opinion in *United States* v. *American Bell Telephone Company*, 159 U.S. 548, wherein it was held that a suit brought by the United States to cancel a patent was not a case "arising under the patent laws of the United States," and that a decree of the Circuit Court of Appeals therein was not final.

BOYD B. JONES,
PHILIP N. JONES,
Solicitors for Appellant.

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No. ~~900~~ ~~342~~ 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,
Plaintiff, Appellant,

v.

ELIAS B. WILCOX,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., Plaintiff, Appellant, v. ELIAS B. WILCOX, Defendant, Appellee.	No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

Comes now Ben A. Matthews, Solicitor for E. B. Wilcox, appellee, on behalf of the appellee, and respectfully moves the court to dismiss the appeal herein, upon the ground that the decree of the Circuit Court of Appeals is final and not reviewable in this court on appeal, and that this appeal was taken solely for delay.

This case was commenced in the United States District Court for Porto Rico on June 8, 1914, by the filing of a bill in equity to foreclose an alleged mortgage held by the Bank on property of Wilcox. The jurisdiction of the district court was based solely upon the diverse citizenship of the parties, the bank being a Porto Rican corporation and Wilcox a citizen of the United States. After various pleadings and motions, testimony was taken, and decree of foreclosure entered August 25, 1916. Thereafter a bill of review was filed and dismissed by the court, and an appeal was perfected on February 24, 1917, by Wilcox, to the Circuit Court of Appeals, First Circuit. That Court on December 3, 1917, entered its final decree as follows:

> "The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill and the appellant recovers his costs."

On February 27, 1918, the Bank filed its petition for an appeal to this Court alleging a final decree, matter in controversy in excess of $1,000, "and that this cause is one in which the decree of the Circuit Court of Appeals is not final, and is a proper cause to be reviewed by the Supreme Court of the United States on Appeal."

Section 238 of the Judicial Code provides for appeals directly to the Supreme Court from the various District Courts including the District Court for Porto Rico in the following cases only:

> "1. In any case in which the jurisdiction of the Court is in issue, in which case the ques-

tion of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.

2. From the final sentences and decrees in prize causes.

3. In any case that involves the construction or application of the Constitution of the United States.

4. In any case in which the constitutionality of any law of the United States, or the validity of construction of any treaty made under its authority is drawn in question.

5. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

Section 238 of the Judicial Code was brought forward from §5 of the Act of March 3, 1891, 26 Stat., 827, and was last amended by §2 of the Act of January 28, 1915, 38 Stat., 804.

Section 128 of the Judicial Code provides for appellate jurisdiction of the Circuit Court of Appeals, and impliedly authorizes appeals to the Supreme Court only in those cases which might have been carried directly to the Supreme Court from the District Courts as provided in §238.

Section 241 of the Judicial Code provides that:

"In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the

matter in controversy shall exceed one thousand dollars, besides costs."

However, §128 of the Judicial Code provides:

"The judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens * * * or citizens of different states."

This section was last amended by §2 of the Act of January 28, 1915, 38 Stat., 803, so as to include the District Court for Porto Rico.

Other provisions respecting the District Court for Porto Rico are found in the following laws:

§34 Act of April 12, 1900, 31 Stat., 85;
§3 of the Act of March 2, 1901, 31 Stat., 953.
The Act of January 7, 1913, 37 Stat., 648;
§41 of the Act of March 2, 1917, 39 Stat., 965.

The only provisions of these statutes that seem to have any possible bearing on this case are in §35 of the Act of April 12, 1900, 31 Stat., 85, which provided that writs of error and appeals might be taken from the District Court of Porto Rico in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the territories. But this section was repealed by necessary implication by the Act of January 28, 1915, 38 Stat., 803, which contained amendments to §§128, 238 and 246 of the Judicial Code, as well as an amendment to §116 of the Judicial Code, by

which the District of Porto Rico is placed within the First Circuit. These amendments, taken in connection with §6 of the Act of January 28, 1915, which provides:

> "This act shall not affect cases now pending in the Supreme Court of the United States, or cases in which writs of error or appeals have been allowed at the date of its approval,"

demonstrate to a certainty the repeal of the provision of §35 of the Act of 1900, allowing appeals from the District Court of Porto Rico directly to the Supreme Court. But even if §35 remain in force it does not authorize this appeal.

From the foregoing it will be seen that no case can be taken on appeal to the Supreme Court where the jurisdiction of the District Court was based solely upon the diverse citizenship of the parties. There is no suggestion anywhere in the record in this case that jurisdiction was based upon any other ground. An examination of the record will demonstrate that it does not fall within any of the classes specified in §238 of the Judicial Code. No constitutional or jurisdictional questions have been raised.

There being no right of appeal in this case, it must be that it was taken for delay only.

The appeal should therefore be dismissed with costs.

Respectfully submitted,

BEN A. MATTHEWS,
Solicitor for Appellee,
New York City.

April 25, 1919.

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No. 91

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,

Plaintiff, Appellant,

v.

ELIAS B. WILCOX,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R. Plaintiff, Appellant, v. ELIAS B. WILCOX, Defendant, Appellee.	No. 342.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

Comes now *José R. F. Savage*, Solicitor for E. B. Wilcox, appellee, on behalf of the appellee, and respectfully moves the court to dismiss the appeal herein, upon the ground that the decree of the Circuit Court of Appeals is final and not reviewable in this court on appeal, and that this appeal was taken solely for delay.

ARGUMENT.

This case was commenced in the United States District Court for Porto Rico on June 9, 1914, (p. 2, record) by the filing of a bill in equity to foreclose an alleged mortgage held by the Bank on property alleged to belong to Wilcox. The jurisdiction of the district court was based solely upon the diverse citizenship of the parties, the bank being a Porto Rican corporation and Wilcox a citizen of the United States. After various pleadings and motions, testimony was taken, and decree of foreclosure entered August 25, 1916. (p. 34, record) Thereafter a bill of review was filed and dismissed by the court, and an appeal was perfected on February 24, 1917, by Wilcox, to the Circuit Court of Appeals, First Circuit. (pp. 71,72, record) That Court on December 3, 1917, entered its final decree as follows:

> "The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill and the appellant recovers his costs," (p. 99, record).

On February 27, 1918, the Bank filed its petition for an appeal to this Court alleging a final decree, matter in controversy in excess of $1,000, "and that this cause is one in which the decree of the Circuit Court of Appeals is not final, and is a proper cause to be reviewed by the Supreme Court of the United States on Appeal." (p. 99, record).

It has been repeatedly held in construing the provisions of Sec. 6 of the Act of March 3, 1891, 26 Stat. 828, which has been re-enacted as Sec. 128 of the Judicial Code that the decisions of the Circuit Court of Appeals are final where the jurisdiction of the trial court depended wholly upon the "diverse citizenship of the parties".

Arbuckle et al., v. Blackburn et al., 191 *U. S.* 405.

It is apparently the contention of the appellant in the case at bar that the phrase "diverse citizenship of the parties" must be restricted to that particular kind of of diverse citizenship defined in Sec. 128 of the Judicial Code, to wit, where the parties are "aliens and citizens of the United States, or citizens of different States", and that it does not apply to the case at bar, because, although the jurisdiction of the trial court depended solely on the diverse citizenship of the parties, one of the parties, the complainant and appellant, was a corporation organized and existing under the laws of Porto Rico, and was neither an alien, nor a citizen of a state.

But no other District Court of the United States, except the District Court for Porto Rico, would have jurisdicion, on the sole ground of diversity of citizenship of the parties, of any cases except such as are defined in Sec. 128, and where that is the sole ground of jurisdiction, the decisions of the Circuit Court of Appeal are final.

The District Court for Porto Rico, has since its organization been governed as to its jurisdiction and the appellate supervision of its decisions by special legislation of Congress. Its jurisdiction has always been broader than that of any other District Court. By the Act of April 12, 1900 (31 Stat. 85) it had "in addition to the ordinary jurisdiction of district courts of the United States jurisdiction of all cases cognizant in the circuit courts of the United States". By Sec. 3 of the Act of March 2, 1901 (31 Stat. 953) its jurisdiction was enlarged to include "controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars." This was the status of the law at

the time the suit at bar was instituted, and under which the District Court for Porto Rico had jurisdiction of the case. The jurisdiction of the court has since again been changed by Sec. 41 of the Act of March 2, 1917 (39 Stat. 965) whereby, in addition to the ordinary jurisdiction of a district court of the United States, it was given jurisdiction of all controversies "where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or costs the sum or value of $3,000; and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid."

The statutes governing the appellate review of the decisions of the District Court for Porto Rico were also of a special nature, and differed from those governing the review of decisions of any other District Court of the United States.

The Act of April 12, 1900 (31 Stat. 85) creating the Court, provided (sec. 35):

> "That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same cases as from the supreme courts of the Territories of the United States, and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied..."

This provision was changed by the Act of March 3,

ERRATA.

p. 4, line 9. After the word "States" insert:
or citizens of a State, Territory or District of the
United States

1911, establishing the Judicial Code (sec. 244) to read as follows:

> "Writs of error and appeals from the final judgments and decrees of the supreme court of and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error or appeals are taken to the Supreme Court of the United States from the district courts."

This section was repealed, and the appellate supervision of the court again changed, by the Act of January 28, 1915 (38 Stat. 804). This Act amended sections 128, 238 and 246 of the Judicial Code to read as follows:

> "Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district courts for Hawaii and the United States district court for Porto Rico, in all cases other than those in which

appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States district courts for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

"Sec. 246. Writs of error and appeals from the

final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree."

The same amendatory Act further provided in the same section making the foregoing amendments, and in a separate sentence:

"Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent

witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."

The same question presented by the case at bar was raised in a case brought to the Supreme Court of the United States by writ of error to the Circuit Court of Appeals for the Ninth Circuit review the affirmance by that court of a judgment of the Supreme Court of the Territory of Hawaii. It involved no Federal question and there was no diversity of citizenship of the parties, as defined by Sec. 128 of the Judicial Code, but the writ was dismissed for want of jurisdiction.

Inter-Island etc. Co. v. Ward, 242 *U. S.* 1.

In the opinion of the Court the Chief Justice said: (page 2).

> "The argument supporting jurisdiction is that as, by general provisions of the Judiciary Act of 1891 (26 Stat. at L. 828, chap 517), now embraced in Sec. 241 of the Judicial Code (36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, sec. 1218), power exists in this court to review by error or appeal the final decisions of the circuit courts of appeals in all cases where the jurisdiction of the trial court did not depend upon diversity of citizenship, or where the case was not otherwise by provisions of law expressly made final in the circuit courts of appeals, therefore power to review exists, since this case is not in one of the excepted classes. But the contention overlooks the fact that from the beginning and continuously up to the adoption of the amendment of 1915, appeals and writs of error to the supreme courts of Hawaii and Porto Rico were not left to be controlled by the law generally applicable to courts of the

United States, as expressed in the judiciary act of 1891, or as found in the provisions of the Judicial Code, re-adopting that act, but were governed by special provisions controlling the subject,—a purpose which is exemplified by the terms of the amendatory act of 1915. This is plain when it is considered that the two classes of cases enumerated in the amendment of 1915 were practically in the same terms expressed in the prior acts, which conferred reviewing jurisdiction in both classes exclusively upon this court, and that the only substantial change made by the amendatory act was to take from this court the jurisdiction to review in the second enumerated class and confer it upon the circuit court of appeals to which Hawaii belonged. And, indeed, there is nothing in the context of the statute which countenances the view that the statute intended to merely take away the jurisdiction of this court in one class of cases, and, at the same time, to restore jurisdiction as to the same class by means of a power conferred or contemplated to exist to review on error or appeal the judgments and decrees of the circuit courts of appeals. Besides, as the remedy intended to be afforded by the amendment of 1915 was evidently the restricting of the jurisdiction of this court to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish."

The construction of these amendments contended for by the appellant in the case at bar would make final the judgments and decrees of the circuit courts of appeal in all cases depending wholly on the diversity of citizenship

of the parties *only* when the *diversity of citizenship* was such as specifically defined by Sec. 128 of the Judicial Code, while in all such cases where the diversity of citizenship was such as would give jurisdiction only to the district court for Porto Rico, under the present law, as well as under the former laws, the decision of the circuit court of appeals would not be final, but the losing party would be entitled, of right, to a further review by the Supreme Court of the United States. We respectfully submit that such cannot have been the intent of the amendment.

Nor can it be argued that as the case at bar arose under the former jurisdiction of the district court for Porto Rico that a decision permitting the review of this case would not imply any increase of the burden on the docket of the Supreme Court of the United States. The present jurisdiction of the district court for Porto Rico, based solely on diverse citizenship of the parties, as defined by Sec. 41 of the Act of March 2, 1917, *supra*, includes many classes of cases which would fall squarely within the same classes to which appellant contends the case at bar belongs, i. e. those which do not depend on the diversity of citizenship specifically defined by Sec. 128 of the Judicial Code, and yet, if appellant's theory be sustained, in all of those classes of cases (which could only arise in the district court for Porto Rico), and irrespective of the amount involved or the nature of the controversy, writs of error or appeals, as of right, would lie to the Supreme Court of the United States from the circuit court of appeals, thereby causing additional delay, and putting upon the litigants the burden of additional expense.

The proper construction of Sec. 128, we respectfully submit, is, that it was the intention of Congress to make the decisions of the circuit courts of appeals final in all

cases where the jurisdiction depended entirely on the diversity of citizenship of the parties.

American Secur. & T. Co. v. District of Columbia, 224 *U. S.* 491.

Church of the Holy Trinity v. United States, 143 *U. S.* 457.

It was undoubtedly the purpose of Congress, in giving the review of the decisions of the district court for Porto Rico to the circuit court of appeals, to lighten the burden on the docket of the Supreme Court of the United States, just as that was its purpose in giving the same power to the circuit courts of appeals over the decisions of the supreme courts of the Territory of Hawaii and of Porto Rico, and the construction of the amendments to the Judicial Code which sought to bring about this result should be the same in both classes of cases.

From the foregoing it will be seen that no case can be taken on appeal to the Supreme Court where the jurisdiction of the District Court was based solely upon the diverse citizenship of the parties. There is no suggestion anywhere in the record in this case that jurisdiction was based upon any other ground. An examination of the record will demonstrate that it does not fall within any of the classes specified in §238 of the Judicial Code. No constitutional or jurisdictional questions have been raised.

There being no right of appeal in this case, it must be that it was taken for delay only.

The appeal should therefore be dismissed with costs.

Respectfully submitted,

JOSE R. F. SAVAGE,

Solicitor for Appellee.

San Juan, Porto Rico.

September 24, 1919.

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CLERK.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 91.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,
Appellant,

v.

ELIAS B. WILCOX,
Appellee.

APPEAL FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF FOR ELIAS B. WILCOX, Appellee.

JOSE R. F. SAVAGE,
BEN A. MATTHEWS,
Solicitors for Appellee.

PRESS OF FREMONT PAINE, 60 Washington Street, New York City.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 91.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,
PLAINTIFF-APPELLANT,

v.

ELIAS B. WILCOX,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AND ARGUMENT FOR DEFENDANT, APPELLEE.

This case originated in the local District Court at San Juan and was removed to the District Court of the United States for Porto Rico, where a foreclosure decree was entered against defendant. He appealed to the Circuit Court of Appeals for the First Circuit, and secured a reversal. From the decree of reversal this appeal is now prosecuted by the plaintiff Bank.

For convenience the parties herein will be referred to as the Bank or plaintiff, and Wilcox or defendant.

After the case was docketed in this Court, Wilcox moved to dismiss for want of jurisdiction. The Court having postponed consideration of the motion to the hearing on the merits, the question of jurisdiction will again be argued in this brief, which will include for convenience the matter already set forth in the printed motion papers. This argument is set forth at page 12, *infra*.

The other questions presented by the record will then be discussed, but first, to simplify the argument and make clear the circumstantial significance and relation of the several items of proof there will be set forth an outline or

Statement of Facts.

The facts out of which the action arose are stated chronologically.

In July, 1909, Rafael Lopez Landron, an attorney, and his wife, Ana Maria Gutierrez Igaravidez, were the owners of a certain piece of property in the City of San Juan, Porto Rico. On July 29, 1909, they executed a mortgage to El Banco Popular de Economias y Prestamos de San Juan, Porto Rico, the plaintiff-appellant herein, to secure the payment of the principal sum of $4,600 and interest thereon at the rate of one per cent. per month for the term of one year, the interest to be payable every four months in advance, and the entire mortgage to become due upon the failure to pay any installment of interest. This mortgage also included the additional sum of $500 to cover attorneys fees and judicial expenses in the event of foreclosure.

Prior to June 12, 1912, Elias B. Wilcox, defendant-appellee herein, was a member of the law firm of Sweet & Wilcox, which firm prior to that date recovered a judgment for $1,163.35 in the District Court of the

United States for Porto Rico against Rafael Lopez Landron. To satisfy this judgment Landron gave to Sweet & Wilcox eleven promissory notes, without interest, for $100 each payable on the 12th day of July, August, September, October, November, and December, 1912, and January, February, March, April and May, 1913, and a twelfth note for $63.35 payable June 12, 1913, without interest. The payment of these notes, and of the sum of $300 to cover foreclosure costs was secured by the execution by Rafael Lopez Landron and his wife, of a second mortgage covering the same property, in favor of Willis Sweet and Elias B. Wilcox. This mortgage was executed on June 12, 1912, and recorded on July 26, 1912. It recited the existence of the first mortgage of $4,600 in favor of the Bank, and provided that should the debtor fail to pay any one of the notes within 30 days after date of maturity, the remaining installments should be considered as due, and the creditors would be entitled to foreclosure for the balance remaining unpaid.

The debtor failed to meet any of the notes secured by this second mortgage, and on September 6, 1912, Willis Sweet and Elias B. Wilcox brought a suit in the United States District Court for Porto Rico against Landron and his wife to foreclose this second mortgage.

On December 3, 1912, the day before entry of final decree in this suit, without the knowledge of Wilcox, a third mortgage was given by Landron on the same property to the Bank. This mortgage was for $1,700 with interest at 12%, payable every four months in advance. Notwithstanding the foreclosure proceedings, for some unknown reason, this mortgage was not recorded by the Bank until January 28, 1913, and Wilcox did not learn of its existence until after that time.

Final decree was entered in the foreclosure suit on December 4, 1912, and a notice of sale, dated January

7, 1913, was prepared by the Master appointed to sell the property, wherein the sale was announced for February 5, 1913. This notice was never published, nor was any sale of the property held under the decree (Return of the Master, R. p. 25) for these reasons:

Mr. Damian Monserrat, a Lawyer and Notary of San Juan, and also the President and a stockholder of the Bank, called on Mr. Wilcox before the notice of sale was published, and suggested that some way might be found to settle the matter so as to save Mr. Landron the humiliation of having his property advertised for sale. Wilcox, Monserrat and Landron were all lawyers, and Monserrat said this was an ugly thing between lawyers. Monserrat suggested that Landron would be willing to transfer the property to Sweet & Wilcox in satisfaction of their judgment, and asked Wilcox to go to Landron's office to discuss the matter. Wilcox, accompanied by one F. C. Timpson, went to Landron's office at the time set. Landron, Monserrat, Wilcox and Timpson were present at the conference. It was there agreed that Wilcox would take a deed of the property from Landron in satisfaction of the Sweet & Wilcox judgment, and that he would assume the mortgage indebtedness on the property that appeared from the books of the Registry as recorded prior to the date of the mortgage given by Landron to Sweet and Wilcox. It was further agreed that all expenses of the transfer should be paid by Landron, and that the latter within thirty days might repurchase the property upon payment of the amount of the Sweet & Wilcox judgment, plus five hundred dollars and the costs of the new transfer, and, finally, that if Landron did not so repurchase he would vacate the premises at the end of the thirty days, paying as rental for that term the interest for that time on the mortgage held by the Bank on the property. They agreed to reduce this to writing.

Nothing was said at this interview as to the existence of any mortgage other than the first mortgage for $4,600 recited in the mortgage to Sweet & Wilcox. The written agreement, dated January 13, 1913, signed by Wilcox and Lopez Landron, was offered in evidence, but excluded by the Trial Court. It reads as follows (pp. 52-53 of the transcript):

> "This agreement entered into on this the 13th day of January, 1913, in San Juan, P. R., between Rafael Lopez Landron, representing himself and as attorney in fact for his wife, as the party of the first part, and E. B. Wilcox as party of the second part, witnesseth:
>
> "(1) That the party of the first part contracts to sell to the said E. B. Wilcox, the house and lot situated on Park or Tren Street in Santurce, San Juan, in which the said party of the first part lives with his family, which said house and lot is more particularly described in a certain mortgage given by the party of the first part and his wife to the members of the law firm of Sweet and Wilcox upon said house and lot, bearing date of June 12th, 1912, being made before Hugh R. Francis, being No. 6 of the Protocol of said Francis; said party of the first part agreeing to sign the deed of sale for himself and wife as soon as the same may be ready for signing.
>
> "(2) It is further agreed that the price of the said house and lot shall be that amount for which appears in a certain judgment rendered by the Judge of the United States District Court for Porto Rico against the said Rafael Lopez Landron and his wife in favor of the said Willis Sweet and E. B. Wilcox, as members of the late law firm of Sweet and Wilcox, it being understood that the sale and

transfer of the above named property is to satisfy the said judgment and the said E. B. Wilcox agrees to cancel the said judgment upon the signing of the said deed of sale as above provided.

"(3) It is further agreed that the said Wilcox shall assume the incumbrances now existing against the said property which are duly registered in the Registry of Property which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of the said Sweet and Wilcox.

"(4) It is further agreed that any—all expense incident to the preparation of the deed of sale, stamps, etc., shall be paid by the party of the first part.

"(5) It is further agreed that if within thirty days from the date of this agreement, the party of the first part shall so desire, he may within the said thirty days, repurchase from the said E. B. Wilcox the above named property by paying for the same the amount named in the judgment referred to given by the Judge of the U. S. Court together with the sum of Five Hundred Dollars in addition thereto, it being understood that all expenses necessary in connection with the resale of the said property shall be paid by the party of the first part in addition to the amount of the said judgment and the sum of Five Hundred Dollars just named.

"(6) It is agreed further that if the party of the first part does not conclude the repurchase of the property within thirty days named, that he shall vacate the said premises promptly at the conclusion of the said thirty days, it being further understood that during the time mentioned within which the party of the first part may repurchase the property, that he may remain living therein, provided he pays

a rental equal in amount to the interest for that time, payable to the Bank of Porto Rico upon the *mortgage held by said Bank against said property*" (italics ours).

This agreement makes no reference to the Bank's $1,700 mortgage, and refers in the singular to "the mortgage" of the Bank.

The deed was prepared by Monserrat as Notary Public, who was present when the agreement was made between Wilcox and Landron, and was executed on January 14, 1913, the day after the written agreement was signed. When Wilcox went to sign the deed at Monserrat's office he asked Monserrat if it was drawn in accordance with the agreement, and Monserrat stated that it was. Wilcox then signed it without having read it fully. The stamps for recording the deed were furnished by Monserrat to Mr. Timpson, who presented the document for record. Wilcox made one payment of interest after taking title to the property, which seemed to him high but he supposed included some back interest. Thereupon, after investigating, he discovered that the deed prepared by Monserrat, recited the assumption by Wilcox, in addition to the mortgage of $4,600, of a mortgage for $1,700 executed by Lopez Landron and his wife to the Bank on December 3, 1912, but which on the date of executing the deed from Landron to Wilcox had not yet been recorded in the Registry of Property. The existence of this mortgage was unknown to Wilcox until after he had made the payment of the interest referred to. Wilcox then refused to pay any further interest (Testimony Wilcox, R. pp. 50-56; testimony Timpson, pp. 56-62, Defendant's Exhibits A, B, C, D and E, pp. 21-34).

This unrecorded mortgage for $1,700 carried interest at one per cent. per month, payable every four months

in advance, with the additional sum of $200 to cover costs in event of foreclosure. The greater part of the principal sum of $1,700 was accrued unpaid interest on the mortgage for $4,600. The exact amount of this unpaid interest does not appear; the treasurer of the Bank testified (R. pp. 49-50) that he could not state this accurately, at least $1,480.

On June 9, 1914, the Bank filed this bill against Elias B. Wilcox for the foreclosure of the two mortgages held by the Bank, that is to say, the mortgage for $4,600 and the mortgage for $1,700, with accrued interest thereon.

On July 20, 1914, the defendant filed his answer and also a cross-complaint which set forth all the facts hereinbefore recited and the further facts that the deed executed to Wilcox and wherein he assumed the payment of the said mortgages, was null and void because Monserrat, the Notary who drew the same and before whom it was executed and acknowledged, was at the time a stockholder of the Bank holding the mortgages, as well as its President, and that one, if not both of the witnesses to the instrument were employees of the Notary, all or any of which facts rendered the instrument null and void under the laws in force in Porto Rico. Affirmative relief was prayed for.

On August 3rd, 1914, the Bank filed motions to strike the answer and the cross-bill. These motions were denied on July 28, 1915 (R. pp. 10 and 11).

On October 26, 1915, no demurrer, plea or answer having been filed to the cross-bill, Wilcox filed his motion for a decree pro confesso upon the cross-bill (R. p. 11).

On November 15, 1915, the Bank filed a motion to dismiss the answer (R. pp. 11-12) and on the same date a motion to dismiss the cross-bill (R. p. 12). The motion for a decree pro confesso on the cross-bill and the motions to dismiss the answer and the cross-bill

were heard on November 22, 1915, and the parties were given time to file briefs (R. p. 12).

On January 27, 1916, the Court denied the motion for a decree pro confesso on the cross-bill, and granted the motions to dismiss the answer and the cross-bill unless the same should be amended (R. p. 13).

An answer was filed by the defendant on March 13, 1916 (R. p. 73), and an amended answer on July 5th, 1916 (p. 17 of transcript) all under oath, answer under oath not having been waived in the bill.

The amended answer sets out all the facts hereinbefore stated with regard to the agreement between Wilcox and Landron, the preparation of the deed by Monserrat, his assurance that the same was in accordance with the agreement between the parties on which Wilcox relied, and further alleged that the execution by Landron to the Bank of the $1,700 mortgage was not made in good faith, nor for the consideration stated therein; that there existed either a deliberate fraud on the part of the Bank through its president, Monserrat, or such a mistake on the part of the said Monserrat as Notary as to nulify the said deed; it also alleges that Monserrat at the time he acted as Notary in the preparation of the deed was president, one of the principal stockholders of the plaintiff Bank and its legal representative, and that the witnesses to the execution of the deed were in his employ, and concluded by praying that the bill be dismissed, and that the deed from Landron to Wilcox be held for cancellation and declared null and void.

The cause came on for hearing before the Court on the bill, amended answer and the proofs, and on August 25, 1916, the Court entered its final decree in favor of the Bank and against Wilcox, holding the latter personally liable on both mortgages and finding in favor of the plaintiff for the sum of $9,631.93, including prin-

cipal, interest, amount provided for attorneys fees and expenses, and insurance, decreeing that the mortgaged property be sold to pay the same if the amount found to be due should not be paid within ninety days from the date of the decree (R. p. 34).

The Court filed an opinion on the facts and the law as of the same date which will be found at page 85 of the transcript.

On December 23, 1916, Wilcox filed his bill of review in the District Court of the United States for Porto Rico (R. pp. 36-45) setting forth all the facts hereinbefore stated, and also alleging that in an action begun by Wilcox in the District Court of the United States for Porto Rico against Landron and his wife for the cancellation of the deed of the property executed to Wilcox by Landron, a final decree had been entered in favor of Wilcox and against the defendants in that action (R. pp. 87-88).

On January 20, 1917, a motion was filed by the Bank to dismiss the bill of review, which was granted on February 3, 1917 (R. p. 46).

On February 24, 1917, an appeal to the Circuit Court of Appeals for the First Circuit was taken by Wilcox from the final decree of August 25, 1916, and the assignment of errors was filed (R. p. 71).

Placing the salient facts in convenient form they appear as follows:

July 29, 1909—Lopez Landron and wife executed a mortgage in favor of the Bank, for $4,600, which was recorded on May 13th, 1910 (R. pp. 80-82).

June 12, 1912—Lopez Landron and wife executed a mortgage on the same property for $1,163.35, in favor of Sweet & Wilcox (R. p. 27).

July 26, 1912—Last named mortgage recorded (R. p. 27).

Sept. 6, 1912—Foreclosure proceeding begun by Sweet & Wilcox; no payments having been made on obligation as agreed (R. p. 21).

Dec. 3, 1912—Lopez Landron and wife executed a mortgage for $1,700 in favor of appellant Bank, which was not recorded until January 28, 1913 (R. pp. 83-85).

Dec. 4, 1912—Decree obtained by Sweet & Wilcox in foreclosure proceedings against Landron and wife (R. p. 23).

Jan. 13, 1913—Written agreement made between Lopez Landron and Wilcox, under which Wilcox agreed to take over the property and to assume the incumbrances recorded prior to the date of the mortgage executed to Sweet & Wilcox, in satisfaction of that mortgage (R. p. 69).

Jan. 14, 1913—Deed of sale of property from Lopez Landron and wife to Wilcox, executed; recorded Jan. 29, 1913 (R. pp. 29-34).

Jan. 28, 1913—$1,700 mortgage recorded (R. pp. 83-85).

On December 3, 1918, the Circuit Court of Appeals for the First Circuit decreed that the deed to Wilcox was null and void and that the mortgages were uninforceable as to him (R. pp. 90-99).

Motion to Dismiss.

POINT I.

The decree of the Circuit Court of Appeals is final and the Supreme Court has no jurisdiction of this appeal.

The Bank contends that this Court has jurisdiction under Section 241 of the Judicial Code, because this is a

> "case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title."

Wilcox asserts that, properly construed, Section 128 of the Judicial Code as amended by the Act of January 28, 1915 (38 Stat. 803), includes this case in the class of cases wherein the decrees of the Circuit Court of Appeals are made final.

As indicated above, this case was commenced in the local insular court at San Juan and removed (R. p. 85) to the United States District Court for Porto Rico, where on June 9, 1914 (R. p. 2) the Bank filed a bill in equity to foreclose an alleged mortgage held by the Bank on property alleged to belong to Wilcox. The jurisdiction of the District Court was based solely upon the diverse citizenship of the parties, the Bank being a Porto Rican corporation and Wilcox a citizen of the United States. After various pleadings and motions, testimony was taken, and decree of foreclosure entered August 25, 1916 (R. p. 34). Thereafter a bill of review was filed and dismissed by the Court, and an appeal was perfected on February 24, 1917, by Wilcox, to the Circuit Court of Appeals, First Circuit (R. pp. 71, 72). That Court on December 3, 1917, entered its final decree as follows:

"The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill and the appellant recovers his costs" (R. p. 99).

On February 27, 1918, the Bank filed its petition for an appeal to this court alleging a final decree, matter in controversy in excess of $1,000, "and that this cause is one in which the decree of the Circuit Court of Appeals is not final, and is a proper cause to be reviewed by the Supreme Court of the United States on appeal" (R. p. 99).

It has been repeatedly held in construing the provisions of Sec. 6 of the Act of March 3, 1891, 26 Stat. 828, which has been re-enacted as Sec. 128 of the Judicial Code, that the decisions of the Circuit Courts of Appeals are final where the jurisdiction of the trial court depended wholly upon the "diverse citizenship of the parties."

Arbuckle et al. v. *Blackburn et al.*, 191 U. S. 405.

It is, however, the contention of the Bank in the case at bar that the phrase "diverse citizenship of the parties" must be restricted to that particular kind of diverse citizenship defined in Sec. 128 of the Judicial Code, that is, where the parties are "aliens and citizens of the United States, or citizens of different states;" and that it does not apply to the case at bar, because, although the jurisdiction of the trial court depended solely on the diverse citizenship of the parties, one of the parties, the Bank, was a corporation organized and existing under the laws of Porto Rico, and was neither an alien, nor a citizen of a state.

But no other District Court of the United States, except the District Court for Porto Rico, would have jurisdiction, on the sole ground of diversity of citizenship of the parties, of any cases except such as are defined in Sec. 128, and where that is the sole ground of jurisdiction, the decisions of the Circuit Courts of Appeals are final.

The District Court for Porto Rico has since its organization been governed as to its jurisdiction and the appellate supervision of its decisions by special legislation of Congress. Its jurisdiction has always been broader than that of any other District Court. By the Act of April 12, 1900 (31 Stat. 85), it had "in addition to the ordinary jurisdiction of District Courts of the United States jurisdiction of all cases cognizant in the Circuit Courts of the United States." By Sec. 3 of the Act of March 2, 1901 (31 Stat. 953) its jurisdiction was enlarged to include

> "controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

This was the status of the law at the time the suit at bar was instituted, and under which the District Court for Porto Rico had jurisdiction of the case. The jurisdiction of the Court has since again been changed by Sec. 41 of the Act of March 2, 1917 (39 Stat. 965), whereby, in addition to the ordinary jurisdiction of a District Court of the United States, it was given jurisdiction of all controversies

> "where all of the parties on either side of the controversy are citizens or subjects of a foreign state

> or states, or citizens of a state, territory or district of the United States, not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost the sum or value of $3,000; and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversy are citizens or subjects of the character aforesaid."

(See recent construction of this provision in *Porto Rico Ry. Light & Power Co.* v. *Mor*, U.S. decided June 1, 1920.)

The statutes concerning the appellate review of the decisions of the District Court for Porto Rico were also of a special nature, and differed from those governing the review of decisions of any other District Court of the United States.

The Act of April 12, 1900 (31 Stat. 85) creating the Court, provided (Sec. 35):

> "That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied."

This provision was changed by the Act of March 3, 1911, establishing the Judicial Code (Sec. 244) to read as follows:

"Writs of error and appeals from the final judgments and decrees of the Supreme Court of and the United States District Court for Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value in dispute; *and in all other cases in which the sum or value of the matter in dispute,* exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, *exceeds the sum or value of five thousand dollars.* Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error or appeals are taken to the Supreme Court of the United States from the District Courts." (Italics ours.)

This section was repealed, and the appellate supervision of the Court again changed by the Act of January 28, 1915 (38 Stat. 804). This Act amended Sections 128, 238 and 246 of the Judicial Code to read as follows: (The new matter is written in italics.)

"Sec. 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the *United States District Court for Hawaii and the United States District Court for Porto Rico,* in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hun-

dred and thirty-eight, unless otherwise provided by law; and except as provided in sections two hundred and thirty-nine [relating to certified questions] and two hundred and forty [relating to certiorari] the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all *cases arising under the patent laws, under the trade-mark laws,* under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

"Sec. 238. Appeals and writs of error may be taken from the District Courts, including the *United States District Court for Hawaii and the United States District Court for Porto Rico,* direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

"Sec. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within

the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a state in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all *other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree.*"

The same amendatory Act further provided in the same section making the foregoing amendments, and in a separate sentence:

"Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the Circuit Courts of Appeals."

The same question presented by the case at bar was raised in a case brought to this court by writ of error

to the Circuit Court of Appeals for the Ninth Circuit to review the affirmance by that court of a judgment of the Supreme Court of the Territory of Hawaii. It involved no Federal question and there was no diversity of citizenship of the parties, as defined by Sec. 128 of the Judicial Code, but the writ was dismissed for want of jurisdiction.

Inter-Island etc., Co. v. *Ward* 242 U. S. 1.

In the opinion of the Court, the Chief Justice said (p. 2):

> "The argument supporting jurisdiction is that as, by general provisions of the Judiciary Act of 1891 (26 Stat. 828), now embraced in Sec. 241 of the Judicial Code (36 Stat. 1157), power exists in this Court to review by error or appeal the final decisions of the Circuit Courts of Appeals in all cases where the jurisdiction of the Trial Court did not depend upon diversity of citizenship, or where the case was not otherwise by provisions of law expressly made final in the Circuit Courts of Appeals, therefore power to review exists, since this case is not in one of the excepted classes. But the contention overlooks the fact that from the beginning and continuously up to the adoption of the amendment of 1915, appeals and writs of error to the Supreme Courts of Hawaii and of Porto Rico were not left to be controlled by the law generally applicable to Courts of the United States, as expressed in the judiciary act of 1891, or as found in the provisions of the Judicial Code, readopting that act, but were governed by special provisions controlling the subject—a purpose which is exemplified by the terms of the amenda-

tory act of 1915. This is plain when it is considered that the two classes of cases enumerated in the amendment of 1915 were practically in the same terms expressed in the prior acts, which conferred reviewing jurisdiction in both classes exclusively upon this Court, and that the only substantial change made by the amendatory act was to take from this Court the jurisdiction to review in the second enumerated class and confer it upon the Circuit Court of Appeals to which Hawaii belonged. And indeed there is nothing in the context of the statute which countenances the view that the statute intended to merely take away the jurisdiction of this Court in one class of cases and at the same time to restore jurisdiction as to the same class by means of a power conferred or contemplated to exist to review on error or appeal the judgments and decrees of the Circuit Court of Appeals. Besides, as the remedy intended to be afforded by the amendment of 1915 was evidently the restricting of the jurisdiction of this Court to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish."

Counsel for the Bank endeavors to maintain the contentions made in the *Inter-Island* case, *supra*, and then endeavors to overcome the force of that decision (Brief p. 7 and p. 9). The question there, as here, turned upon Section 241, now relied upon by the Bank.

Similarly in *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53, 58, Section 241 of the Judicial Code was held not to authorize an appeal to this Court from the Ninth Circuit Court of Appeals, although the right to

appeal was conferred by a literal reading of the section. In dealing with Section 134 of the Judicial Code, this Court said (p. 60):

> "It is true that Section 134 begins [as does Sec. 128] by reference to cases other than those which may come to this Court, and might be construed to allow appeals to the Circuit Court of Appeals for the Ninth Circuit only in cases which could not be brought directly to this Court. But, bearing in mind the sources of the legislation which was enacted into the Judicial Code and the interpretation which this Court has placed upon the Circuit Court of Appeals Act of 1891, we are led to the conclusion that it was not the intention of Congress to give practically two appeals in the class of cases which we are now considering."

Two Appeals Not Favored.

Two appeals have never been favored and this Court has consistently declined to review judgments of the Circuit Courts of Appeals even where there was a choice of original review by this Court.

McFadden v. *U. S.*, 213 U. S. 288;
Robinson v. *Caldwell*, 165 U. S. 359;
Loeb v. *Columbia Township Trustees*, 179 U. S. 472;
American Sugar Refining Co. v. *New Orleans*, 181 U. S. 277;
Boise Water Co. v. *Boise City*, 233 U. S. 98;
Spencer v. *Duplan Silk Co.*, 191 U. S. 526;
Bankers Mutual Casualty Co. v. *Minn., &c., R. Co.*, 192 U. S. 271.

In *Robinson* v. *Caldwell*, 165 U. S. 359, this Court said:

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals."

The Amendment of 1915 was intended to restrict this Court's jurisdiction and so lighten the burden on its docket. This Court has so held of this, as well as of other similar statutes.

> *Inter-Island Co.* v. *Ward*, 242 U. S. 1;
> *American Security Co.* v. *Dist. of Columbia*, 224 U. S. 491, 495.
> *Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53.

While not exactly the same, it is interesting to note how similar in all these cases are the questions of construction. The object and intent of Congress in each case has been clear, although the language used can, by isolation and losing sight of the general scheme of the cognate legislation, be made to convey a literal meaning so far from the contextual meaning as to approach a *reductio ad absurdam*.

In the *Inter-Island* case, *supra*, immediate appellate jurisdiction over a class of cases from Hawaii was transferred from this Court to the Circuit Court of Appeals for the Ninth Circuit, and it was claimed that the effect of the statute was to award two appeals—one to the Circuit Court of Appeals and a second thereafter to this Court. In the *American Security Co.* case, *supra*, this Court's jurisdiction over cases from the

District of Columbia was limited by Congress to cases involving laws of the United States. It was claimed in effect that all cases in the District of Columbia arose under laws of the United States and that this Court had jurisdiction in cases involving acts of Congress of only local application. In the *Alaska* case it was contended that where an appeal was optional to this Court or to the Circuit Court of Appeals, it might first be taken to the Circuit Court of Appeals and then afterwards brought here. Each contention was overruled, this Court saying in the *American Security Co.* case that "it needs no authority to show that the same phrase may have different meanings in different connections," citing

> *Cochran* v. *Montgomery*, 199 U. S. 260, 272, 273;
> *Carey* v. *Houston & Texas*, 150 U. S. 170, 179;
> *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1 (Bank's brief, p. 11), involved a provision of the patent laws carried forward into the Revised Statutes of 1873. The principle of patent law involved had been adopted by Congress as early as 1839, and the construction placed upon the provision was in harmony with the thrice declared policy of Congress.

Source of Trial Court's Jurisdiction Determines Finality of Decree of the Circuit Court of Appeals.

As was said in the *McFadden case*, 213 U. S. 288, at page 294:

> "It is to be observed that the line of division between cases appealable directly to this Court and

those appealable to the Circuit Court of Appeals, made by Section 5 of the act, is based upon the nature of the case or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this Court and those not so appealable, drawn by Section 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the Trial Court * * * whether the jurisdiction rests upon the *character of the parties* or the *nature of the case.*" (Italics ours.)

This Court has also said:

"The jurisdiction referred to, it has come to be settled, means the jurisdiction of the United States District Court as originally invoked. *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, and previous cases of this Court cited in the opinion of Mr. Chief Justice Fuller, who spoke for the Court in that case."

Southern Pacific Co. v. *Stewart*, 245 U. S. 359, 364.

The description in Section 128 of *classes* of cases reviewable in the Circuit Court of Appeals must be read in the light of the fact that appellate and not nisi prius jurisdiction is provided for.

In the segregation of classes of cases in which appeals to this Court may lie, it was plainly intended to exclude all cases where original trial jurisdiction depended exclusively upon citizenship of the parties. That is, the phrase "opposite parties," etc., as used in the section was intended to indicate the general ground of

jurisdiction—character of parties—of the cases intended to be included in the class and not to limit the class to cases of strict diverse citizenship, such as would give the U. S. District Courts in the States original jurisdiction. In other words, Section 128 does not attempt to define the grounds of jurisdiction of the Trial Court in cases which shall not be taken from the Circuit Court of Appeals to this Court, but merely uses language indicative of the class of cases in which the decisions of the Circuit Court of Appeals shall be final.

Moreover, when Section 128 was amended to include Porto Rico, the diversity of citizenship therein referred to, by virtue of the new context, was intended to refer and apply to the peculiar kind of party qualifications necessary to the statutory jurisdiction of the U. S. District Court for Porto Rico.

Before the amendment of 1915, no case not presenting a federal question could go from the United States District Court for Porto Rico to the Supreme Court, except those involving in excess of $5,000 (Judicial Code, Sec. 244). If Sections 128 and 241, Judicial Code, authorize this appeal, they in effect give, not only two appeals, but extend this Court's jurisdiction to cases of minor amounts ($1,000 and over), which could not be brought here before the 1915 Act.

Under the system of appeals provided by the various Act of Congress, Section 241, originally contemplated review by the Supreme Court of judgments and decrees of the Circuit Court of Appeals in cases arising only in courts of the United States. None of the Insular courts are strictly "Courts of the United States."

McAlister v. *United States*, 148 U. S. 174;
Coquitlan v. *United States*, 163, U. S. 346;

Clinton v. *Engelbrecht*, 13 *Wallace* 434;
Reynolds v. *United States*, 98 U. S. 154;
Insurance Co. v. 356 *Bales*, 1 Peters 511;
Benner v. *Prior*, 9 Howard 235;
Good v. *Martin*, 95 U. S. 90.
Fuller & Fuller Co. v. *Johnson*, 58 Pac. 745;

It is plain, therefore, that Section 241 did not contemplate granting a second right of appeal from decisions of the Circuit Court of Appeals in cases coming to those courts from the Insular courts. The District Court for Porto Rico is not a Court of the United States.

If the decision of the Circuit Court of Appeals is not made final by Sec. 128 of the Judicial Code, then the right of two appeals may exist in Porto Rico, which would not exist in the same or a similar class of cases in the U. S. District Courts in any one of the States, or in similar cases in Hawaii (*Inter-Island Co.* v. *Ward*, 242 U. S. 1), in the Philippines (Act of Sept. 6, 1916, Sec. 5, 39 Stat. 727), in Alaska, (*Alaska Pacific Fisheries* v. *Alaska*, 249 U. S. 53) or the District of Columbia (*American Security Co.* v. *Dist. of Col.*, 224 U. S. 491).

Under Sec. 3 of the Act of March 2, 1901, which was in force when the case at bar was begun and finally determined, or under Sec. 41 of the Act of March 2, 1917, which at present determines the original jurisdiction of the District Court of the United States for Porto Rico, many classes of cases of which the District Courts of the United States could not take jurisdiction can be brought in the District Court for Porto Rico. For example: An alien can sue another alien in that court (provided one of them be not domiciled in Porto Rico); with the same proviso, a resident of Porto Rico

and a citizen thereof (they are all citizens of the United States, "citizen of Porto Rico" is used to distinguish them from a citizen of a State) can sue either an alien or a citizen of a State or a citizen of a Territory, or a citizen of the District of Columbia, and vice versa. It does not require any evidence to show that in the natural course of events, in nearly every case, one of the parties will be a citizen of Porto Rico. But none of these cases could be brought in any District Court of the United States on the ground of "diversity of citizenship."

Hooe v. *Jamieson*, 166 U. S. 395;
Cameron v. *Hodges*, 127 U. S. 325;
New Orleans v. *Winter*, 1 Wheat. 91;
Hepburn v. *Ellzey*, 2 Cranch 445;
Laird v. *Indemnity &c. Co.*, 44 Fed. Rep. 712.

The result of the adoption of the construction of Section 128 of the Judicial Code contended for by Appellant will be to give to the Supreme Court of the United States jurisdiction to review the decisions of the Circuit Court of Appeals by appeal or writ of error, as a matter of right, in every case where the diversity of citizenship of the parties is such as indicated in the preceding paragraph. In other words the great majority of the cases arising in the District Court for Porto Rico will go first to the Circuit Court of Appeals and then to the Suprime Court of the United States, and only in those cases (whose number is comparatively limited) where the diversity of citizenship of the parties is such as would give jurisdiction to a District Court of the United States under Sec. 24 of the Judicial Code, will the decision of the Circuit Court of Appeals be final. In other words all cases of which the

District Court of the United States for Porto Rico alone would have jurisdiction would, as of right, be entitled to two appellate reviews, whereas those of which all district courts would have jurisdiction would be entitled as of right to but one.

We contend that the intention of Congress was to prevent, rather than encourage, successive appeals; to limit, rather than enlarge, the appellate jurisdiction of the Supreme Court, and to make final the judgment of the Circuit Court of Appeals in all cases appealed to that Court from the U. S. District Court for Porto Rico unless otherwise expressly provided by law.

Congress has so construed the Act.

The Act of March 2, 1917, supra, commonly referred to in Porto Rico as the Jones Act—the last Organic Act of Porto Rico—confirms the construction of Section 128 contended for by Wilcox. Section 41 is the first section of this Act dealing with the United States District Court of Porto Rico; and Section 42 continues to treat of the same Court. The pertinent part is its last sentence, which reads:

> "The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said Circuit Court of Appeals in all cases where the same would lie from any District Court to a Circuit Court of Appeals of the United States, and with the right of appeals and review directly by the Supreme Court of the United States in all cases where a direct appeal would lie from such district courts."

This statute was enacted in March, 1917, after Section 128 of the Judicial Code had been amended in

1915 to include the United States District Court for Porto Rico, as then existing under the Foraker Act of 1900 and its amendments. But apparently this new statute purposely ignores that fact, and would seem to have intended to clarify the amendment of 1915 to Section 128. In Section 43 it says:

> "That writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States *as now provided by law.*"

The repealing clause of the Act of March 2, 1917, is Sec. 58, which reads as follows:

> "That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs and duties on importations into Porto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes" approved April 12, 1900, are hereby continued in effect, *and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.*" (Italics ours.)

Why should Congress have recognized the existence of the provisions of the amendments of 1915 to the Judicial Code in the case of the Supreme Court of Porto Rico, and ignored them in dealing with the United States District Court for Porto Rico? Was it not that because of the peculiar nature of the jurisdiction of the latter Court, as based on diversity of citizenship, it was

not the intention of Congress to have the finality of the decisions of the Circuit Court of Appeals, dependent solely on the interpretation of the language of Section 128 as amended in 1915, and that the intention of the Act of 1917 was to give an appeal *either* to the Supreme Court of the United States, where such appeal would lie directly to that court from a District Court of the United States, or to the Circuit Court of Appeals in all other cases, *and no other appeals*. The Supreme Court would always have authority, under Sec. 240, to review any decision by certiorari.

For these reasons, it is respectfully submitted this Court has no jurisdiction of this appeal, and it should be dismissed, with costs.

Argument on the Merits.

POINT II.

The Circuit Court of Appeals did not err in holding that the assumption of the payment of the $1,700 mortgage was secured by fraud.

In this connection the first, second, third and fifth assignments will be discussed together (p. 100 transcript).

The District Court erred in excluding the memorandum agreement of January 13, 1913.

Wilcox, while testifying as to the circumstances under which he came to take the deed to the mortgaged property from Lopez Landron, attempted to introduce in evidence the written agreement signed by himself and

Lopez Landron on January 13, 1913 (the day before the execution of the deed of sale), which set forth the agreement reached by them at the conference held at Lopez Landron's office at which Monserrat, the Notary before whom the deed was executed and the president and stockholder of the Bank, was present. The Trial Court refused over proper exception to allow the document to be introduced. This action is assigned as error by Wilcox in his 7th Assignment of Error (p. 64 transcript) on appeal to the Circuit Court of Appeals.

This document was offered to prove the exact terms of the agreement reached by the parties, and further to prove that the deed executed by them on the day next succeeding the signing of this document did not set forth the true terms of the contract between the parties.

It is true that the Court, while refusing to admit the paper itself in evidence, allowed Wilcox to read it, and in this way it came into the record (R. pp. 52-53) so as to permit intelligent review of the question of its admissibility. It must be assumed, however, that it was given no probative force whatever. The document was the best evidence of the agreement, and the defendant was entitled to its admission, and we maintain that its exclusion was error, sufficient in itself to warrant a reversal of the decree of the District Court. The Circuit Court of Appeals has so held, and the Bank does not seriously attack this part of the decision.

The issues as raised by the amended answer (R. pp. 17, 20) presented to the Court for its determination the alternative of two propositions: either that the Notary in drawing the deed had by mistake failed to set forth in it the real agreement between the parties, or that there was wilful fraud on the part of Monserrat to secure for his Bank an advantage which otherwise it would not have had.

The Court permitted Wilcox to testify fully with regard to all the conversations and negotiations leading up to the execution of the deed; and this document, the tangible written evidence of the result of these conversations and negotiations, was certainly better evidence of the agreement of the parties than any recollection of witnesses as to statements made several years previously.

It may be proper at this time to point out that this case does not fall within the well-known rule that generally a party will not be relieved from his failure to read over a document before signing it, merely because he relied on the representations of the other party to the instrument. Wilcox relied upon the representation of the Notary, who had heard the agreement made, and who was supposed to have no personal interest in the transaction. He was a fellow lawyer, and claimed to be a friend of both parties. This question will be discussed at length in its proper place in this brief; at this point we wish merely to call the Court's attention to the fact that Monserrat, in drawing the deed, as a Notary under the Notorial Law, was not the representative of either party, but was supposed to be wholly disinterested and that the parties were entitled to rely upon him under his bond to set forth the exact agreement as made by them.

It is unnecessary to cite any authorities on the proposition that when either fraud or mistake is alleged, the real nature of the transaction may be proved, even by parole evidence. The writing in question was material both as to the mistake in the deed, if mistake it was, and also was relevant in showing whether fraud had been perpetrated.

The evidence is conclusive that during the twenty-four hours that elapsed between the signing of this

paper and the signing of the deed there was no further negotiation between the parties, and no change was made in their plan. Yet the deed as signed by them on the 14th of January, the very next day, makes Wilcox assume an unrecorded mortgage which he did not know existed, and which the agreement, signed by him and Landron the day before, makes very evident was never intended to be assumed by Wilcox, even if he had known of it. To have done so would have been to surrender the priority of his own recorded mortgage, and virtually to make the Bank a present of that sum, which he had already reduced to a judgment upon a mortgage foreclosure proceeding.

Wilcox agreed by this writing to assume all incumbrances:

> "now existing against the said property which are duly registered in the Registry of Property, which bear a date prior to that of the mortgage given by the party of the first part and his wife in favor of Sweet & Wilcox."

This document is further evidence of the fact that only one Bank mortgage was discussed. The 6th paragraph of this agreement permits Landron to reside in the house for thirty days, provided he pays a rental equal to the interest payable to the Bank "upon the *mortgage* held by said Bank against said property." Had more than one Bank mortgage been discussed, this clause would have read "mortgages" and not "mortgage" (see Bank's Brief, p. 23).

This clearly shows that Wilcox, who drew this paper, and Landron who signed it also, referred to, and had in mind at the time, only the one mortgage held by the Bank, and not two. The mortgage for $1700 which Wil-

cox appears to assume under the deed of January 14, 1913, was dated December 3, 1912, and at the time of the execution of the deed had not been recorded (R. pp. 83-85).

This mortgage, as testified to by the Treasurer of the Plaintiff Bank (R. p. 50, cross examination) was, to the extent of at least $1480, for unpaid interest on the first mortgage for $4600 held by the same Bank. It was subsequent to a mortgage held by Sweet & Wilcox which was then being foreclosed, and as to which a final foreclosure decree had been entered. The property was about to be advertised for sale. It was in fact executed but one day before the final decree in the foreclosure action was entered. The mortgage debtor, Landron, as shown by the testimony of the Bank treasurer, by the pleadings in the action brought by Sweet & Wilcox, and by the mortgage which he gave Sweet & Wilcox (R. pp. 21-29-61), was a man who was unable to meet his financial obligations. If the Bank did not get Wilcox to assume this $1700 mortgage under the terms of Wilcox's agreement with Landron, the Bank would have had recourse to Landron alone. By inserting it in the deed, and making Wilcox assume it, the Bank secured at least the position of holding first and second mortgages, instead of first and third, and substituted a third party in the place of a bad debtor. Wilcox, on the other hand, lost his position as the holder of a second mortgage, lost his rights under his decree of foreclosure, and assumed an incumbrance to which his own lien was superior.

The testimony of Lopez Landron on behalf of the Bank is in so many particulars proved untrue and inaccurate by the other evidence, that it is difficult to give any part of it credence (R. pp. 60-62). He states that he paid the interest on the $4600 until 1912, and yet the

Bank treasurer testifies that in December, 1912, there was at least $1480 due for interest, or over two years' interest. (One year's interest on $4600 at one per cent. per month is $552.) He also says that the mortgage for $1700 was given a long time before the deal with Mr. Wilcox, whereas it was executed on December 3, 1912, and the deal with Wilcox was made the next month. He also says that this $1700 was the second mortgage, and that later he gave the mortgage to Sweet & Wilcox, whereas the documents show this is not the fact.

Another peculiar circumstance is the fact that in the mortgage for $1700 (R. pp. 83-85) Lopez Landron wholly failed to recite the existence of any other mortgage in addition to the mortgage for $4600, although, as already stated, at the time he signed the mortgage for $1700 the decree of foreclosure of the Sweet & Wilcox mortgage was about to be entered against him. It may well have happened that Lopez Landron deceived the Bank at the time he gave them this last mortgage, and that the Bank did not learn of the Sweet & Wilcox mortgage and of its foreclosure until after it had taken this last mortgage. The Bank stood to lose its $1700 if the Sweet & Wilcox foreclosure went as far as sale, or else it would have to buy in the property to protect this amount. It could no longer collect the $1480 or whatever was the real amount of the unpaid interest on the $4600 for that was included in the $1700 mortgage.

This was the position in which the Bank found itself after the execution of the mortgage for $1700. Monserrat's interest in seeking to obtain some arrangement with Wilcox, instead of being solely that of a friend of Landron, was that of the attorney, the president and a stockholder of the Bank. And yet no mention was made to Wilcox of any such adverse interest, nor was any mention made of any mortgage other than the $4600 until the deed itself was drawn, when it was put in and

recited among the liens on the property. When Wilcox asked the Notary if the deed was drawn according to the agreement, he replied in the affirmative; and Wilcox, relying upon him as an attorney and a Notary, accepted his word and signed the deed, never regarding him as an adverse party with whom he must deal at arms' length. Of course, Monserrat denies that Wilcox did not read the deed, and further states that he, the Notary, read it over to him. The Notarial Law requires that the Notary should do this, and Monserrat obviously would not admit that he had failed to comply with the law.

With such a showing the trial court was justified in going into all the details of the transaction, but having gone into them, it should have admitted all, and not a part only; and particularly should it have admitted the written agreement which, under the circumstances, was the best evidence of the agreement reached by the parties.

Considering the Memorandum Agreement of January 13, 1913 (erroneously excluded by the Trial Court), with all the other evidence in the record, the Circuit Court of Appeals correctly held the deed of January 14, 1913, to have been fraudulently imposed upon Wilcox by the Notary in behalf of the Bank.

It must be borne in mind that the Trial Court's findings of fact left out of consideration entirely the memorandum agreement of January 13, 1913,—and also, it would seem, all the parole evidence in the case—taking the deed as "the *primary source* of evidence in the transaction." Even so, the trial judge found the case "not without difficulties upon the question of fact" (R. p. 86). On the other hand, the Circuit Court of Appeals in reaching its conclusion as to the facts, considered the contract of January 13, 1913, all the surrounding circumstances, the testimony of the witnesses, their interest and bias, and the human probabilities of the case.

Wilcox insists that the evidence clearly establishes either a mistake in the provisions of the deed, or a wilful fraud on the part of the Bank through its president, Monserrat, whereby Wilcox was made to assume a mortgage he knew nothing about. Neither Monserrat nor Landron can be considered disinterested witnesses. The only disinterested witness, Timpson (R. pp. 56-57 and 62) corroborates Wilcox that Monserrat was at Landron's office when the agreement was made. Let it be noted that neither Monserrat nor Landron would deny the presence of Monserrat at the conference between Landron and Wilcox when the agreement was made. Monserrat says he does not remember (R. p. 58), and so does Landron (R. p. 61). Timpson contradicts Monserrat's statement that the copy of the deed was delivered by him personally to Wilcox. Monserrat, when pressed on cross examination, finally admitted (R. p. 60) that Wilcox might have sent for the deed by some other person.

Beginning with the execution of the $1700 mortgage by Landron to the Bank on the eve of a foreclosure sale of the property under a mortgage held by Sweet & Wilcox, the whole transaction is inexplicable except on the theory of a deliberate fraud on the part of Monserrat for the benefit of the Bank. That a bank would take a third mortgage on this property when the interest on the first mortgage was so far in arrears, and the principal overdue, is astonishing. It certainly does not accord with the ordinary procedure of responsible banks. And to take it while the property is about to be sold under foreclosure is still more remarkable. Having taken such a mortgage, it is not strange that Monserrat should try to get the Bank out of the situation in some way, hence the scheme to get the property transferred to a third party. But the only way to get the Sweet & Wilcox mortgage out of the way, is to get these mortgage credi-

tors, or one of them, to take the property for the mortgage. If the mortgage creditors took over the property, by the doctrine of confusion of rights (Secs. 1160-1162 of Civil Code of Porto Rico), their mortgage became cancelled *ipso facto*, and the Bank would be the sole mortgage creditor, its third mortgage for $1700, moving up and becoming a second mortgage. We again call the Court's attention to the peculiar circumstance that although on December 3, 1912, when the $1700 mortgage was executed, the Sweet & Wilcox mortgage was not only of record, but was being foreclosed, no mention of any lien, other than the Bank's first mortgage, was made in the instrument signed by Landron and the Bank that day. The Bank (Brief p. 28) quote's Landron's testimony that the $1700 mortgage was given "a long time before the deed to Wilcox." The record shows that this mortgage was given less than six weeks before January 13, 1913. The record also shows that the interest included in the "$1700 mortgage" was made up in part of interest in advance, i. e., from December 3, 1912, to April 3, 1913. Furthermore, the $1700 was based in part, if not wholly, on an illegal consideration. There is no evidence of the exact amount owing by Landron to the Bank for interest on the first mortgage on December 2, 1912. Landron says he doesn't remember, but testifies it was paid up to 1912, while the Bank's treasurer is unable to testify exactly, but puts it at about $1480. This was the greater part of the consideration for the $1700 mortgage. Both mortgages carried the highest rate of interest permitted under the laws of Porto Rico, viz., twelve per cent. per annum. The $1700 mortgage was, therefore, only an attempt to extort usury, in other words, an attempt to get interest on interest. This question will, however, be treated fully in another point of this brief; it is mentioned here solely as a step in the chain of events. Under all of these circumstances it is

not strange that Monserrat, in approaching Wilcox, did so, not as representative of the Bank, but as fellow lawyer and old friend of Landron, who did not want to see his friend humiliated by having his home sold over his head. No one can doubt after reading the evidence, that the interview took place at Landron's office, and that Monserrat was there, and that an agreement was reached. What was then agreed upon might have been left to the recollection of the witnesses, but for the document signed by Landron and Wilcox on January 13, 1913, which Landron recognized and later (R. p. 61) admitted he signed. But in connection with Landron's testimony, it is to be observed that he continually attempts to get into the record the statement that the order of the mortgage liens was, first, the mortgage for $4600; second, the one to the Bank for $1700, and last the Sweet & Wilcox mortgage; whereas, the last was the second, and the $1700 mortgage was the third. It is also significant that Landron does not categorically deny that Monserrat and Wilcox were in his office. Like Monserrat he hides behind the old phrase that "he doesn't remember."

In this connection Monserrat's testimony (R. pp. 58-60) should be most carefully scrutinized. He is the president and a stockholder of the plaintiff Bank, and would, to such an extent as he was a stockholder, personally profit or lose in its transactions. In this action he is charged in his professional character as an attorney and a Notary with either mistake or an actual act of fraud. He is, necessarily, heavily interested in the outcome of the trial. He testifies in rebuttal on behalf of the plaintiff, after Wilcox had testified fully as to the part taken by Monserrat in the whole transaction. The most significant part of this entire testimony is that he does not make even an attempt to contradict's Wilcox's testimony as to the part Wilcox charged him with taking

in bringing about the arrangements between Wilcox and Landron which culminated in the deed of January 14, 1913. Wilcox's testimony in this regard is therefore uncontradicted, and it must be accepted as a fact that Monserrat was the person who initiated the negotiations, and exactly in the way that Wilcox says. Having secured Wilcox's consent to a conference to discuss terms of settlement, it is only natural that he should have been present when the parties came together to discuss the terms.

As to the conference in Landron's office, Monserrat says: "I don't remember to have been present at a meeting at Mr. Landron's office" (R. p. 58). Later he says: "I was not present when the agreement between Mr. Wilcox and Mr. Landron was made; this is the first time I ever saw that document" (R. p. 58). It is not clear whether he means that he was not present when any agreement between Wilcox and Landron was made, or that he was not present when Wilcox and Landron signed the written agreement on January 13, 1913. If he means the first, he is contradicted both by Wilcox and by Timpson, and he contradicts himself as well. Monserrat states (beginning line 10, testimony of Monserrat, R. p. 58): "In accordance with instructions which he (Wilcox) gave me I took down my notes. Then I asked the other party (Landron) if he agreed with that contract and he answered affirmatively. • • • Of course, this took place on a certain day to be carried out or executed on the next day upon his return from the country." And again (line 17, R. p. 60): "I received instructions on one day as to how to draw the deed and perhaps on the next day the paper was ready. • • • Then of course the parties got together, at least twice, before the Notary."

Monserrat himself, by these statements, admits that the parties to the deed had a meeting before him, prior

to the day on which the deed was executed. Wilcox and Timpson say such a meeting took place. Landron "doesn't remember." Wilcox and Timpson say the meeting was at Landron's office, and that Monserrat was there. Monserrat admits a previous meeting of the parties in his presence, but does not say where. The terms of the agreement were reduced to writing, and this written document was signed by the parties only the day before the deed was executed.

If Monserrat meant to testify that he was not present when this written memorandum of agreement was signed, he agrees with all the witnesses, for the evidence is that Wilcox drew it up and signed it, after the conference between the parties, and sent it to Landron for his approval and signature.

The day after the paper setting forth the terms of the agreement in unequivocal language was signed, Wilcox went to the office of Monserrat to sign the deed. Signing on the part of the grantor, under the Spanish practice, is the equivalent of the delivery elsewhere in the United States. He was in a hurry, he testifies. As provided by the Notarial Law of 1906, Sec. 17, the original document which Wilcox signed in Monserrat's office, was written in long hand, for this section of the law forbids the use of a typewriter in drawing the originals, the first page containing twenty lines and the remaining three sides of the sheet, twenty-four lines each (Section 12 of Notarial Law of 1906). This document as printed in the record covers five full pages (pp. 29-34). It was no short document, or one whose contents could be as readily grasped as a printed or typewritten paper. In addition to all this, it was written in the Spanish language, which was not Wilcox's native tongue. To have translated such a document, would have been a long and tedious job. It is often

difficult at once to grasp the meaning of a legal document written in one's own language, and the task is greater when the document is couched in a foreign tongue. The terms had not only been discussed and agreed upon in the presence of the Notary, but had been reduced to writing only the day before. It was not extraordinary, under all these circumstances that Wilcox should rely upon the statement of the Notary (whom he believed to be not only impartial but also a man of standing in the community), that the document was drawn in accordance with the agreement of the parties. The fact that the document was drawn in Spanish, appears from the certificate of the Court Interpreter, Mr. Fano, at the end of the document (R. p. 34). Wilcox had no cause at the time to suspect Monserrat of any interest in the transaction other than his statement that as an old friend of Landron, he wanted to bring about a settlement between them that would avoid a forced sale of the property. There is no evidence that at this time Wilcox knew that Monserrat had any relation whatever with the Bank which held the first mortgage. He knew him as a fellow lawyer and a Notary. He relied upon him to set forth in the deed the agreement which he had brought about, and which he had heard discussed and entered into by the parties. Wilcox knew nothing about the $1700 mortgage. It had not been presented for record. As a matter of fact, it was not presented for record until January 28, 1913 (R. p. 85), just the day before the deed to Wilcox was presented for record (p. 34) and fourteen days after the deed to Wilcox had been executed. This was apparently just at the time Wilcox was seeking to get a copy from Monserrat and stamps from Landron for recording the deed. This is another most peculiar circumstance and coincidence. The Bank

held this mortgage from December 3, 1912, until January 28, 1913, before presenting it for record, when the Civil Code of Porto Rico (sec 1776) provides that in order that a mortgage shall be validly constituted, it must be presented to the Registry of Property.

And is it reasonable to suppose that Wilcox, who the day before had signed an agreement specifically promising to assume only those obligations of record which bore a date prior to the Sweet & Wilcox mortgage, should on the next day, without any further negotiations, or any new consideration, agree to assume an obligation which was not at the time a lien on the property? Sweet & Wilcox had a decree in their favor for $1465.35 and $300 in addition (Final Decree, R. p. 23) or $1765.35, which Wilcox under his agreement with Landron was to satisfy by taking a deed to the property and assuming the obligations of record prior to the Sweet & Wilcox mortgage. The deed makes him agree to cancel the Sweet & Wilcox mortgage and to assume in addition to the prior lien, a personal obligation of Landron's for almost the identical amount that Landron owed Sweet & Wilcox. And we insist that this was, at the time of signing the deed, only a personal obligation, because until it was recorded, or presented for record, it did not become a lien upon the real property. With one hand, Wilcox gives Landron $1763 and with the other, he assumes Landron's obligation to the Bank for a like amount.

And who are benefited by this arrangement? Technically Landron, in the first place, because all his obligations to the Bank are assumed by Wilcox. But to all practical purposes, Landron is not much concerned, as is evident throughout his testimony, because he had nothing left with which to meet these obligations. He had only the house and lot, and these he was giving up.

In his testimony, he said, "at the time I had no interest in the house, I considered it a loss" (R. p. 61). But the one benefited to the greatest extent was the Bank, the plaintiff in this case, for it secured a new debtor, an endorser, so to speak, of Landron's indebtedness to the Bank, and not only secured this new debtor's personal responsibility for all of Landron's indebtedness, but converted the personal obligation of Landron, that is to say the unrecorded mortgage for $1700 into a lien upon the property conveyed to Wilcox.

Turning for a moment to the deed itself, and bearing always in mind that this was a long instrument, written in long hand, in the Spanish language, and with all amounts written out and not stated in numerals, this deed (R. p. 29) recites two mortgage liens on the property, one for $4600, the other for $1700. As we have seen, there were two mortgage liens at that time, the first for $4600 and the second (Sweet & Wilcox) amounting under the decree to $1765.35. Is there not a suspicious similarity between the amount of $1700 recited in the deed as the amount of the so-called second mortgage, and the amount of $1765, which was the amount due on the real second mortgage? Monserrat knew that the property was subject to the Sweet & Wilcox mortgage at the time, for he recites it in the deed in clause fourth (R. p. 31). Why does he omit it, in stating the liens then existing, and refer to it in an entirely different clause? And we must remember in this connection, that no one has given a plain straightforward explanation of how the amount of the last mortgage from Landron to the Bank came to be $1700. Part was interest, we are told, and part cash, but the exact amount of the one or of the other cannot be stated, either by Landron, the debtor, or by the treasurer of the Bank. Is not this, in itself a most sus-

picious circumstance? Does not this dovetail into a wilful, carefully prepared plan to saddle this mortgage of $1700 on Wilcox, if he can be induced to take over the property? Does this not explain why no mention is made to Wilcox throughout the negotiations of the existence of this mortgage, and why it was not presented for record before Wilcox's signature to the deed was secured? The deed is drawn in such a manner that any one casually examining it, would find that it recited two mortgage liens, one for $4600 and another for $1700. The property was then subjected to two mortgage liens, one for $4600 the other for $1765. But the exact amount of the second mortgage recited is not so material to the purchaser, because under his agreement, it is to be cancelled anyway. Monserrat knows that the purchaser knows of but two liens and but two are recited. The amount of one which is substituted for the real second lien is almost identical in amount. The whole transaction is one which should make a strong appeal to a court of equity as one entitling Wilcox to full and complete relief.

If Wilcox, in this action cannot obtain the affirmative relief of having the deed to him declared null and void because of fraud on the part of the Bank or of mistake on the part of the Notary, at least, he is entitled to set these matters up as a defense to the Bank's action, and to prevent in this action the perpetration of a fraud.

And, if, as we insist, this was a deliberate fraud practiced upon Wilcox by Monserrat as an official of the Bank, for the benefit of the Bank, can it be said that the Bank comes into equity with clean hands, or that it is entitled to any consideration at the hands of a court of equity?

In view of the cases elsewhere cited, it is unnecessary to burden the Court with a citation of authorities to

sustain the proposition that in cases of mistake or fraud, courts of equity will relieve the prejudiced parties.

The Bill of Review, and the opinion of the Court on the motion to dismiss this Bill of Review (R. pp. 36-45 and 46-49) show that Wilcox promptly brought an action in the United States District Court for Porto Rico against the grantors in the deed of January 14, 1913, to declare the same null and void, and that a final decree was entered in that action in favor of Wilcox on January 4, 1917 (pp. 87-88), within a few months after the entry of the decree of foreclosure appealed from herein, and before a sale of the mortgaged property was had under this decree. So that while Wilcox, in this action was defending against the foreclosure on the grounds of mistake or fraud, he was at the same time litigating with the grantors the validity of the same deed on the same grounds.

Wilcox was entitled to be put back in the position occupied by him at the time the deed was executed to him, and neither ordered to pay what he did not undertake, if it were a simple mistake of the Notary, nor any part of the amount if the whole transaction was, as we insist, a deliberate fraud. Nor should he be exposed to a deficiency judgment for any amount not covered by the sale of the property.

In view of all the evidence and all the surrounding circumstances, which in cases of this nature often speak louder than the words of the witnesses, the trial court erred in finding that neither mistake nor fraud entered into the transaction, and the Circuit Court of Appeals did not err in so finding.

It will of course be urged that Wilcox was negligent in failing to read the deed, and that he should not be relieved from the consequences of his own negligence.

But this question has often been before the courts, as the following cases will show, and relief has been afforded in equity under similar circumstances. Particularly is this so when trust and confidence are reposed in the person making the representations as to the contents of the instrument, as in this case, where the party representing the instrument to be in accordance with the previous agreement between the parties was not the other party to the deed, but was the Notarial official to whom had been entrusted the task of reducing the agreement to a recordable form.

If a known trust and confidence is reposed in the person making representations as to the contents of a written instrument, and there is a relationship justifying such trust and confidence, then the person to whom they are made may rely upon them. *Robinson* v. *Glass*, 94 Ind. 211, 37 L. R. A. 600.

In *McGinn* v. *Tobey*, 62 Mich. 252, where a person signed without reading what purported to be a duplicate lease but which proved to be a deed of his real estate, at the instance of a lawyer who had transacted his business and drawn the lease for him and who professed to be his friend, the Court says that under the circumstances he had a right to put a little faith in the integrity of one honored and trusted in the community where he lived, and was not so negligent in signing the duplicate without reading it as to lose his rights in the property against one holding on the faith of the record title.

In *Elliot* v. *Sackett, et al.*, 108 U. S. 132, this Court reversed a decree of the Circuit Court and set aside a deed which was at variance with a written agreement, and applied the principle laid down in *Snell* v. *Insurance Co.*, 98 U. S. 85. In the opinion in *Elliott* v. *Sackett*, the Supreme Court said:

> "Elliott (the appellant) says that when Sackett gave him the deed in Hill's office, he was unwell; that he did not read that part of the deed which states that he is to assume and pay the incumbrance, but only read the prior part which states that the conveyance is made subject to the incumbrance,"

and that

> "Under all the circumstances proved this case (and every case of the kind must depend very largely over its special circumstances), Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief."

And further, that

> "The fact that Elliott made two payments of the interest on the incumbrance is not inconsistent with his not having assumed the payment of the incumbrance. As owner of the property subject to the incumbrance, and desirous of retaining it so long as there was any value in the equity of redemption, he would naturally pay the interest to save a foreclosure."

Wilcox paid interest only once: the bill was so large that it surprised and mystified him. He then sent to the recorder's office where the copy had been sent, got it, and for the first time discovered the $1700 mortgage to the Bank. After this he refused to make other payments of interest (R. p. 53). Wilcox had not seen the copy before it went to the recorder's office, because Mr. Timpson, at his request, went to the Notary's office,

and got it and took it direct to the recorder's office (p. 62, testimony of Timpson, p. 60, testimony of Monserrat).

One party may trust the other to reduce the agreement to writing.

Botsford v. *McLean*, 45 Barb. 478.

It is not necessarily negligent to rely upon the representation of a person who has taken the draft of a contract away to copy, that the papers he returns are correct copies of the draft.

Strong v. *Linington*, 8 Ill. App. 463.

One who has entrusted the other party to the contract with the duty of reducing it to writing may rely on his representation that he has done so accurately. One who has perpetrated a fraud should not be permitted to say to the defrauded party that he ought not to have believed or trusted him.

Albany City Sav. Ins. v. *Burdick*, 87 N. Y. 40. See also cases cited in note 6 L. R. A. (N. S.) 462.

Griffin v. *Roanoke Ry., &c., Co.*, 140 N. C. 514, 6 L. R. A. (N. S.) 463.

Bixler v. *Wright*, 100 Atl. 467, L. R. A. 1917 F. and note.

One may defend against the enforcement of a mortgage the signature to which was obtained by fraudulently representing that it embodied the contract previously entered into orally, and although there was negligence in failing to read the instrument. In *Colorado Invt. Co.* v. *Beuchat*, 48 Colo. 494, 111 Pac. 61. The Court stated:

"While, in ordinary business transactions, men are expected to exercise reasonable business prudence, and not rely upon others with whom they deal to protect and care for their interest, that requirement is not carried so far as to ignore or protect positive, intentional fraud successfully practised by one upon the other. As between the original parties, one who has intentionally deceived the other, to his prejudice, is not to be heard to say in defense of the charge of fraud that the party defrauded ought not to have trusted him. A person cannot procure a contract in his favor by misrepresentations regarding its terms and conditions to the one signing it, which induces the latter not to read it, and then bar a defense to it on the ground that, had the defrauded party not been so negligent, the party committing the fraud could not have succeeded in deceiving him, when the negligence of the party deceived is caused by misrepresentations and false statements of the other. In brief, the negligence of a party to a contract, induced by the fraud of the other, cannot be taken advantage of by the latter."

In *Herried* v. *Chicago, M. & St. P. R. Co.,* 159 N. W. 1064, it was held that failure to read a deed of right of way did not preclude grantor from avoiding a release-of-damage clause contained therein, where, previous to the signing of such instrument, there had been a specific oral agreement that conveyance of the right of way should in no way preclude grantor from recovering any damages that he might suffer by injury to or destruction of the spring, and, in reliance upon such statements, and believing them to be true, his signature was procured.

And again in *Tanton* v. *Martin,* 80 Kan. 22, 101 Pac. 461, one was held not precluded from contesting the

validity of a lease by the fact that he failed to read it before attaching his signature, where it contained terms other than those orally agreed to, and he signed under the belief, induced by the false representations of the other party, that it embodied the terms previously agreed to. The Court said:

> "It is contended that if parties who sign an instrument can read, they will not be heard to say that they did not read or know the contents of the writing, unless they were dissuaded from reading it by some fraudulent act, artifice, or trick. Was there no fraud, artifice, or trick in the act of plaintiff's agent in telling the defendants that the long, complicated writing of about seven printed pages contained only the provisions requiring them to pay two-fifths of the grain and $60 in cash, when he had placed in the body of the lease a provision requiring them to pay $200 that had not been mentioned in the oral negotiations? Was there no fraud, artifice, or trick in lulling inquiry as to the contents of such a writing by falsely and fraudulently representing that it contained only certain specific things, where there had been inserted another stipulation greatly enhancing defendant's liability? There is a well recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulations agreed upon when in fact it does not, and where the party signing relies upon the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induces another to execute by false representations as to its con-

tents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract by the fact that he failed to read it before attaching his signature."

See also:

Hale v. *Hale*, 59 S. E. 1056, 14 L. R. A. (N. S.) 221.

Stone v. *Moody, et al.*, 84 Pac. 617, 5 L. R. A. (N. S.) 799.

American Fine Arts Co. v. *Reeves, P. Co.*, 127 Fed. 808, 810.

In *Shields* v. *Mongollon Exp. Co.*, 137 Fed. 539, it was held that:

"Where, in executing a deed in pursuance of a settlement, the grantor relied on the representations of his attorney, who informed him that the deed was 'all right and according to a memorandum' where the grantor had furnished, he was not guilty of such negligence, in failing to read the deed, as precluded a subsequent reformation thereof, so as to exclude an interest in a certain mining claim included by mutual mistake."

It has also been held that:

"Where a party carelessly or negligently signed a written contract which, by mistake of the scrivener, failed to conform to the oral agreement made by the parties, he may have the written contract reformed in equity if the evidence clearly shows what the oral agreement was."

Story v. *Cammell*, 68 Neb. 709, 94 N. W. 982.

It will be insisted, of course, that the plaintiff's evidence is to the effect that Wilcox did not sign the deed without reading it, but that, on the contrary, he not only read it himself, but that the Notary, Monserrat, read it aloud. There is only the testimony of Wilcox on the one hand, and the testimony of Monserrat on the other. But according to Monserrat, not only Wilcox, but Landron and the two witnesses were present when all this reading was being done. Where is there any testimony from Landron on this point? He is produced as a witness in rebuttal by the plaintiff, but he is not questioned as to what took place in Monserrat's office when the deed was signed. Nor are either of the witnesses to the deed produced, although Monserrat says they were present. In this connection, the charge made in the cross-bill and in the amended answer, that these witnesses were really employees of Monserrat, and therefore disqualified to act as witnesses to the deed, may be the explanation of their absence from the trial. But whether that was the reason for not producing them, no reason was given for their non-appearance. Monserrat, the Notary had to insist that he had complied with the provisions of the Notarial law. Section 17 of the law of 1906 provides:

> "Public instruments shall be drawn up in the Spanish language but may be in English whenever the persons taking part thereto know such language. They must be written in a legible manner and without abbreviations or blank spaces, but shall not be typewritten. Figures shall not be used in the statement of dates and amounts, and the notary shall certify that he has read the instrument to the parties and witnesses to its execution, or that he had allowed them to read it, at their option, before signing, and had apprised each of his right to read it for himself."

He could not admit that he had allowed Wilcox to sign the instrument without reading it, or having read it to him, because such an admission would mean that Monserrat had failed to comply with the law.

Answering Point II Bank's Brief.

The Bank fails to point out the "documentary evidence of the most important character disproving the charges of fraud and demonstrating the defendant's lack of credibility," which it says (Brief, p. 16) the Court failed to consider. The pleadings referred to on pages 19 and 20 are not inconsistent with Wilcox's testimony. It is plain that the agreement with Landron, excluded by the Trial Court, had as its primary object the working out of Landron's financial difficulties by postponing a forced judicial sale of the mortgaged property. The exact steps to be taken of course depended upon events to follow the agreement of January 13, 1913.

The Bank also complains of the reversal of the Trial Court's finding of facts (Bank's Brief, pp. 14-16). It is to be noted that the Trial Court's conclusion was the result of *indecision* on the evidence considered, excluding the most persuasive and convincing of it, namely, the agreement of January 13, 1913. The Court of Appeals took into consideration this agreement, which of course throws an entirely different light on all of the other evidence considered by the Trial Court. Taking this agreement into consideration, the evidence sustains Wilcox's contentions beyond any reasonable doubt.

The Bank again (Brief, p. 18) says the evidence was squarely conflicting. The evidence for Wilcox was positive and direct, whereas the Bank's witnesses "could not remember."

The Bank's Brief, page 22, in discussing the interest, gives $368 as the amount of two unpaid quarters on the $4600 mortgage. This is incorrect, as the interest on $4600 for two quarters at 12 per cent. is only $276. In the same connection the Bank, at the bottom of page 22, says: "The receipt he took was for 'the sum of $252 as interest on the sum of $6300 for four months'" (R. p. 50)...In fact the receipt was for $252, but does not disclose the period or the amount upon which it was paid.

The argument on the facts in the Bank's Brief, although perhaps not intentionally so, is grossly unfair at certain points not elsewhere pointed out. For instance at the bottom of page 23 and top of page 24 it is said that the description of the incumbrances in the excluded agreement as those "which bear a date prior to that of the mortgage" to Sweet and Wilcox, is due to the fact that Landron understood that these mortgages were recorded (R. p. 61). This could not be true, because the $1700 mortgage was not executed until December 3, 1912, long after the date of the Sweet and Wilcox mortgage.

In the same paragraph Wilcox's testimony is attacked because it is said he testified that the agreement refers to the first mortgage and states the amount (R. p. 55). The record shows that Wilcox did not recall whether the agreement stated the amount or not. His recollection was not clear on the subject and he had to refresh it by examining the agreement, as his testimony shows.

Again on page 24, the Bank states that Landron testified that he understood Spanish better than English. The record (p. 56) shows that he testified that he understood Spanish better than he spoke it (Spanish).

POINT III.

The Circuit Court of Appeals did not err in adjudging that the deed is null and void under provisions of 1998, R. S. of Porto Rico.

This proposition covers the Sixth, Ninth and Twelfth assignments, which refer to the $4600 mortgage, and the Seventh which refers to the $1700 mortgage. If the deed be null and void under the provisions of Section 1998, it would equally affect the $1700 mortgage.

It was alleged in the verified amended answer herein that the Notary who drew the deed of January 14, 1913, and before whom the same was executed, was at the time, the president, the legal representative and a large stockholder of the plaintiff Bank, and that therefore the deed was null and void under the provisions of Section 1998 of the Compiled Statutes of Porto Rico (Sec. 20 of the Act to Regulate the Notarial Profession in Porto Rico, approved March 8, 1906).

It was also alleged in the same amended answer that the witnesses to the execution of this instrument were in the employ of the Notary, and that therefore, under the same section of the laws of Porto Rico, the deed was null and void.

Both of these allegations are in paragraph IX of the amended answer (R .p. 19).

(a) The deed was null and void because the Notary, Monserrat, was at the time a stockholder of and the president of the mortgagee.

The alleged relationship between the Notary, Monserrat, and the Bank which held the two mortgages on the property was admitted on the trial (see stipulation, R. p. 50).

Section 20 of the Notarial Law relied upon, which is Section 1996, Compiled Statutes of Porto Rico, reads:

> "The following public instruments shall be null and void:
>
> 1st.—Those in which the notary authorizing the same has intervened as a party thereto, or which contain any provision in his favor.
>
> 2nd.—Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument, are witnesses thereto."

The office of Notary in Porto Rico, and his position in the community is a very different thing from that of a Notary Public as generally known throughout continental United States. The Notarial Laws and Regulations promulgated by Spain for Cuba and Porto Rico as set forth in Part 3 of House of Representatives, Document No. 1484, 60th Congress, 2nd Session, pages 2947-2969, show in detail the importance and responsibility of their office and duties. The above Section 20 of the Notarial Law of 1906 is a re-enactment of Art. 27 of the Spanish Notarial Law. The decisions of the Spanish Courts contain no decision, so far as we have been able to discover, construing this section with regard to documents executed before a Notary interested as stockholder or officer in an institution affected by, or interested in, the transaction. And no such decision can exist for the reason that under the old law the Notary was expressly prohibited from taking part in the administration of any such institutions within their district. Section 26 of the Organic Notarial Regulations for Cuba and Porto Rico provided:

"Art. 27.—Notaries cannot be surety for the contracts they certify to, nor take part in the notarial district:

1.—In transactions of speculation, exchange, or profit which are not the income of their own property.

2.—In the administration of any bank of discount or brokerage establishment of a commercial or industrial company or of enterprises for leasing public revenues.

3.—In contracts or business in which they take part by virtue of their office."

The object and purpose of the Spanish Notarial Law was to compel the Notary to occupy such a position in the community that he would not be open to any suspicion of interest in the transactions which might require his services in his district.

The entire system for the execution of notarial documents is different in Porto Rico from that existing elsewhere in the United States, with the exception of Louisiana.

A number of sections of the Notarial Law are here referred to, to show the extent of the precautions taken to guard against fraud, wise precautions in view of the great probity accorded notarial instruments in Porto Rico.

(1) Section 1990, Compiled Statutes of Porto Rico:

"Original instruments shall be written on full sheets and the part left for the binding shall be a blank margin of twenty millimeters and besides a margin of sixty millimeters on the left side of each page of the instrument, where the notary shall affix his special mark, and a margin of three milli-

meters on the right side of each page: Provided, that notaries shall commence original instruments on new sheets only, and the front side of the first page shall contain twenty lines and the remaining sides twenty-four."

(2) Section 1991:

"No public instrument, save those especially provided by law, shall be authenticated by a notary unless executed in the presence of two witnesses: Provided, That those who do not know how to sign, relatives, clerks or servants of the certifying notary, and relatives or parties in interest, within the fourth degree of consanguinity or second degree of affinity, shall not be admitted as witnesses to public instruments."

(3) Section 1994, provides that the notary shall certify as to his acquaintance with the parties to the instrument, but if not known to him, their identity may be certified to by two witnesses whom he knows.

(4) Section 1995:

"Public instruments shall be drawn up in the Spanish language, but may be in English wherever the persons taking part therein know such language. They must be written in a legible manner and without abbreviations or blank spaces, but shall not be typewritten."

(5) Section 2009, the protocols are bound periodically.

(6) Section 2013, protocols are the property of the People of Porto Rico and never leave the notary's possession, except in case of his death, resignation or dis

qualification when they are taken to the Keeper of Archives of the District.

(7) Section 1999:

"Provisions in favor of relatives within the fourth degree of consanguinity or second of affinity, of the person certifying as a notary, shall be of no effect and are null and void."

Provision is made for issuing copies of notarial instruments in C. S. of P. R. 2001, 2002 and 2003. Certified copies of the originals are issued for recording in the proper office of the Recorder of Property, the originals never leaving the Notarial archives.

From C. S. 1990 quoted above, it is seen that the original is made on loose sheets, facilitating unauthorized changes in the instrument by rewriting and substituting a page, as the signatures appear only on the last page of the instrument. And in this suit, we have before us and are forced to rely upon, not the original documents, but *the certified copies* of the originals issued by the Notary, Damian Monserrat, the president and a stockholder of the plaintiff Bank, who is beneficially and otherwise heavily interested in the result, a situation never contemplated by the law in Porto Rico, and against which it attempts to guard.

The Bank argues (Brief p. 37) that the deed did not contain any provision in favor of either Monserrat or the Bank, but at page 57 it cites the Trial Court's opinion referring to the Bank as the principal party in interest. If the Bank was not a party in interest and if the deed contained no provision in favor of it or of Monserrat, its president, then the District Court erred in dismissing the Bill of Review. In any event, the Bank's right against Wilcox depended entirely upon Wilcox's agreement with Landron. It makes little dif-

ference by what terms this interest is defined or described. Equity looks through form at the substance of things.

Before considering the decisions of American courts on the question, we insist that under the very language of the section quoted, in view of all of the circumstances of this case, and particularly in the light thrown on the spirit of the Notarial Law by Art. 27 of the old law above quoted, the Notary, Monserrat, was disqualified from acting as a Notary in the execution of the deed from Landron to Wilcox.

Taking first the literal words of the statute, does not this deed while not specifically naming him as a beneficiary, nevertheless contain a provision in favor of the Notary? He is the president and a stockholder of the Bank which holds two mortgages on the premises transferred; he has been present at a conversation between the parties at which Wilcox agrees to assume the encumbrances on the property of record prior to a certain date; the second mortgage held by the Bank is not of record and was executed after the date fixed in this agreement; the property is about to be sold at foreclosure under a mortgage superior to the second mortgage held by the Bank; the Bank will be compelled, if the foreclosure sale is held, to buy in the property to protect its last mortgage, or, if Wilcox only assumes the first mortgage, the Bank will be left to look to Landron for $1700. Landron's inability to pay any such sum had just been demonstrated, first by his failure to pay to the Bank the interest due on the first mortgage, and second, by his failure to meet the notes secured by his mortgage to Sweet & Wilcox, resulting in the foreclosure of their mortgage on his dwelling. Under all these circumstances, can it be said that a deed whereby a new debtor assumed all the responsibilities of a

bad debtor contained no provisions in favor of one who was both an officer and a stockholder of the creditor Bank? Actually the stockholders are the ones who benefit by the profits, and suffer through the losses of a corporation, for while, in name, the corporation is the gainer or the loser, the stockholders are those who reap the benefit or feel the loss. Under the old Notarial Law, as we have seen, he would not have been open to this temptation, for he could not, without a violation of the law, have been placed in such a predicament. In view of all the circumstances, it cannot be said that the corporation of which he was both stockholder and president derived no benefit from the deed.

We insist that the benefit accruing to the Bank and to the Notary has been made most manifest.

It is settled by a long line of decisions, with but few exceptions, that an acknowledgement to an instrument, taken by an officer who has a direct beneficial interest in the instrument is void; and a stockholder of a corporation is generally held, in accordance with this rule, to be disqualified to take an acknowledgement to which the corporation is a party.

Ogden Bldg. etc. Ass. v. *Mensch,* 196 Ill. 554, 63 N. W. 1049;
Wilson v. *Griess,* 64 Neb. 792, 90 N. W. 866;
First Nat. Bk. v. *Citizens St. Bk.,* 11 Wyo. 32, 70 Pac. 726;
Miles v. *Kelley* (Texas), 40 S. W. 599;
Jenkins v. *Jonas Schwab Co.,* 138 Ala. 664, 35 So. 649;
Hayes v. *Southern H. B. & L. Ass.,* 124 Ala. 663, 26 So. 527;
Winsted Sav. Bk. v. *Spencer,* 26 Conn. 195;
Betts-Evans Trading Co. v. *Bass,* 2 Ga. App. 718, 59 S. E. 8;

Southern Iron & Equipment Co. v. *Voyles,* 138 Ga. 258, 75 S. E. 248;
Opinion of the Justices, 75 N. H. 313.

The rule is universal that an officer cannot take an acknowledgement of his own deed. And because of the probative force accorded to the certificate, as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgement should be exercised by a person financially or beneficially interested in the transaction. 1 Cyc. 553. While there may be some diversity of opinion in the application of the rule in determining whether the officer is disqualified by interest in the particular case, the wisdom of the rule has never been doubted. The rule that interest will disqualify does not depend upon any statutory prohibition. It arises out of the fact that it is against public policy to permit a grantee or mortgagee, or any other person beneficially interested in the transaction, to take an acknowledgement to an instrument in which he is named as a party, or has a beneficial interest. The law contemplates that the Notary must not be in such pecuniary relationship to the transaction that there shall exist any temptation for him to be otherwise than impartial between the parties to the conveyance.

It is maintained in a large majority of the decided cases on this point that a stockholder of a corporation beneficially interested in an instrument is disqualified from taking an acknowledgment thereto. 1 Devlin, Real Estate, Sec. 477b. See note to the case of *Ardmore Nat. Bk.* v. *Briggs Machinery & Supply Co.,* 16 Ann. Cas. 133, where a large number of cases are collected and examined; *Betts-Evans Trading Co.* v. *Bass,* 2 Ga. App. 718, 59 S. E. 8. While it is conceded, under the doctrine of corporate entity, that a stockholder has no independent

ownership in the corporate property, nevertheless, if the corporate property is enhanced in value, he gets the benefit of the enhancement in the increased value of his shares; and while the benefit may be small, the amount of beneficial interest cannot be made the criterion of disqualification on the ground of interest. His shares of stock entitle him to such aliquot parts of the corporate property as his number of shares bears to the entire capital of the corporation. His holding of stock may be so large that almost any transaction of the corporation may affect the value of his shares. Indeed, a corporation may have only one stockholder (*Exchange Bank* v. *Macon Constr. Co.*, 97 Ga. 1, 33 L. R. A. 800, 25 S. E. 326), and in such a case there would be no difference, even in degree, between the pecuniary interest of the stockholder and the corporation.

Southern Iron & E. Co. v. *Voyles*, 138 Ga. 258, 75 S. E. 248.

This is the way in which the courts regard the mere taking of the acknowledgment to an instrument not necessarily prepared by the Notary. How much more should the same rule apply to the Notaries of Porto Rico, who are charged with the duty of drafting the entire document, before whom it is executed, and who, after its execution, retain the original in their custody, delivering only to the interested party copies of the original certified to by the Notary.

Applying the proposition as laid down in the above citation to the case at bar, we have the president and a stockholder of a bank acting as the Notary who drew, and before whom was executed, an instrument in which the Bank was most certainly "beneficially interested." And the doctrine laid down in this citation is merely a statement, in different language, of the Porto Rican

statute, that a Notary shall not authorize any document containing a provision " in his favor," and that any such document which he may authorize shall be null and void.

There is no evidence in the record that at the time of the execution of the deed by Wilcox, he had any knowledge of the relation existing between Monserrat and the Bank.

(b) **The deed was null and void because the witnesses were clerks and servants of the Notary. This meets the 10th assignment of error.**

This ground of nullity is statutory, being the second provision contained in Sec. 20 of the Notarial Law of 1906 (supra).

It is objected that no proof was presented in support of this allegation of the amended answer.

In the first instance this was set up in the cross-bill which was dismissed. We submit that it was proper matter to be set up in the cross-bill as a ground for affirmative relief, and a decree pro confesso was prayed and denied.

It was again set up in the amended answer on which the case went to trial, also as ground for affirmative relief, i. e., that the deed be declared null and void. This amended answer was under oath, the oath not having been waived by the bill. We insist that as this allegation was not set up as new matter in answer, but, under the ruling of the lower court on the motion to dismiss the cross-bill, was set up as a counterclaim or offset, on which affirmative relief was prayed, as provided by Equity Rule 30, the plaintiff, under Equity Rule 31, should have replied thereto, and that in default of such reply, the verified answer, so far as the setoff or counterclaim on which the prayer for affirmative relief was based is concerned, would be evidence on the trial for

the defendant, as it would have been under the old practice when no replication was filed. But if not properly a part of the cross-bill, then it was a part of the amended verified answer, and the allegation being evidence, it was not denied by evidence, and therefore stands proved.

Campbell v. *Northwest Eckington Co.*, 229 U. S. 561, 574, 579;
Vigol v. *Hopp*, 104 U. S. 441;
Kenne'y v. *Custer*, 174 Fed. 972;
Jacobs v. *Van Sickle*, 127 Fed. 62;
1 *Whitehouse Equity Practice*, Sec. 282.

For this reason we submit that upon the pleadings the Trial Court should have found for the defendant on this ground, and declared the deed null and void, and the Circuit Court of Appeals did not err in so finding.

In connection with this allegation of the answer, and as evidence tending to support it, it is a remarkable circumstance that in every Notarial document introduced in evidence in this case which was executed before either the Notary or his son, Francisco Soriano appears to have been one of the witnesses. The first is the $4600 mortgage, executed July 29, 1909 (R. p. 82); the second is the power of attorney from Landron's wife to Landron, executed October 27th, 1909, which appears at length in Defendant's Exhibit E (R. p. 33); the third is the $1700 mortgage from Landron to the Bank, executed December 3rd, 1912 (R. p. 84), and the last is the deed from Landron to Wilcox (R. p. 34). This, in itself, is certainly remarkable. The same man acts as witness to four deeds which happen to appear in this record, executed at different times during a period of over three years in the same Notarial office.

The Bank's argument under its Point IV proceeds entirely upon the theory that the answer was not re-

sponsive. This objection is raised for the first time in this Court. It is elementary that this Court will take the lower Court's construction of pleadings. The Trial Court held on motion of the Bank that the allegations respecting the witnesses should be included in the answer and not in a cross-bill. Defendant's cross-bill was stricken out and the answer upon which the case went to trial was thereafter filed (Bank's Brief, p. 32). Exception should have been taken by a proper motion in the Trial Court if defendant objected to the form of allegation. There is no denial by way of replication or otherwise in the record. The witnesses normally should have been called by the Bank, being in the employ of its president.

The answer is definitely responsive to the allegations of the Bank's bill seeking foreclosure upon the deed of January 14, 1913. Wilcox answers that the deed is null and void and proceeds to state the grounds of nullity. This certainly cannot be called irresponsive or new matter.

The Bank contends (Brief, p. 41) that the deed of January 14, even if viewed under Section 1998 (Sec. 20) of the Notarial Law of Porto Rico, may yet be effective as a private instrument under Sections 1191 and 1193. Section 1191 applies only to "defective instruments" and not to instruments which are null and void. In this case the instrument is not defective in the sense of Section 1191, but is absolutely null and void under Section 1998, because of the Notary's interest and because his servants were witnesses and also because of mistake and fraud. Any other construction placed on the word defective under Section 1191 would render of no avail whatever the safeguards thrown around the execution of public instruments by Section 1998. If an instrument executed by an interested Notary can be enforced, it makes little difference whether it is enforced

as a private or public document, in fact it makes no difference unless it is sought to prejudice the rightz of third parties.

The provisions of Porto Rican law respecting contracts, quoted in the Bank's Brief, are not peculiar, but set forth what is common-place in American contract law. Consent of the contracting parties did not exist in the instrument sought to be enforced in this case (Bank's Brief, p. 44).

The deed as drawn by Monserrat cannot be held to set forth the agreement between the parties, since it includes the $1700 mortgage not contemplated by the written agreement of January 13, 1913; so that appellant's contention that the Notary's incapacity would only change the nature of the document from a "public" to a "private" one is untenable. The element of consent was absent so that the deed of January 14 was void under Section 1232. Consent given by error, under violence or deceit, shall be void.

The Bank seeks to make something of the fact that Wilcox was in possession of the property. His possession was entirely consistent with his position as a mortgagee. But he was consistent from the discovery of the fraud in his position that the deed was invalid. He not only refused to pay further interest, but in the foreclosure proceedings set up his contentions in cross-bill as well as answer; and in addition he brought an independent suit against Landron to annul the deed.

The cases cited at the bottom of page 44, Bank's Brief, do not attempt to construe Section 1191 of the Civil Code of Porto Rico (R. S. Sec. 4297). In each one of the cases cited the cause of action arose from an agreement which was not embodied in a written instrument and the decision of the Supreme Court of Porto Rico in each case was simply that the absence of a written agreement does not necessarily deprive a party to such

an agreement from obtaining from the Court specific performance thereof if he can prove the nature of the agreement and the consideration by means of any other evidence. These cases would support the proposition that the preliminary agreement between Wilcox and Landron would still be enforceable at the instance of either party to the agreement were the decree of the Circuit Court of Appeals to be affirmed on this appeal.

The Bank may urge that if the deed of January 14, 1913, cannot be enforced as a private contract, it still has a right to proceed upon the agreement of January 13, 1913, which was excluded by the Trial Court. This could not be done for the reason that the agreement was merely an executory contract and until the deed therein contemplated was executed no third parties could enforce it.

POINT IV.

The $1700 mortgage is also null and void as usurious.

The consideration for the $1700 mortgage was developed on cross-examination of the complainant's first witness, the treasurer of the Bank (p. 49 transcript). The greater part of the $1700 was unpaid interest on the first mortgage of $4600, estimated by the treasurer from a memorandum, not from the books of the Bank, to have been about $1480. The interest on the first mortgage was one per cent. per month, or twelve per cent. per annum, payable every four months, in advance. The mortgage for $1700 also bore the same high rate payable in the same manner. By this operation the Bank secured the payment of all of the interest to December 3, 1912, on the first mortgage by a lien on the property (if the mortgage was recorded) and also secured twelve per cent. interest per annum on this interest.

The laws with regard to interest in Porto Rico are clear. They are set forth in the Compiled Statutes of Porto Rico, Sections 4171-4182. Section 4172 provides for no greater interest than twelve per cent. per annum by contract, Section 4174 excepting from this provision only loans made by licensed pawnbrokers, or bottomry and respondetia bonds and contracts. Section 4175 provides as follows:

> "No person except as authorized by Section 3 of this Act [Sec. 4174 Compiled Statutes] shall demand or receive, directly or indirectly, any money or goods, at any greater rate of interest for the loan or extension of time of said loan, than the rate provided for herein.
>
> Any contract wherein or whereby there is reserved, accepted or secured, any greater rate of interest than is allowed by this Act, is utterly void for all purposes, insofar as the interest is concerned; and a Court of competent jurisdiction may enjoin the collection of said interest, and any proceeding to enforce such contract shall be void, in so far as it refers to the interest."

Section 4182 of the Compiled Statutes, Art. 1076 of the Civil Code of Porto Rico, also provides:

> "Interest due shall earn legal interest, from the time it is judicially demanded, even if the obligation should have been silent on this point."

"Legal interest," as fixed by Section 4172 of the Compiled Statutes (Sec. 1 of Law of Interest, approved March 1, 1902, as amended by the Act approved March 12, 1903, p. 108, Laws of 1903) is fixed at six per cent. per annum, the parties, by special agreement being allowed to contract for the payment of twelve per cent.

Sec. 4172, Com. Stat., Sec. 1, Law 1902 as amended 1903.—"That in the absence of an agreement in writing entered into and executed at the time, the rate of interest upon the loan or forebearance of money or goods or upon any variety of obligation or contract or upon unpaid judgments, shall be at the rate of six ($6) dollars annually, on each one hundred ($100) dollars or upon its equivalent of value and at the same rate for a greater or less sum or for a longer or shorter period. PROVIDED, however, that no rate of interest shall be fixed by special agreement in excess of twelve ($12) dollars on each one hundred ($100) dollars or upon its equivalent of value. Within the limit here defined it shall be lawful to discount bills and notes and other similar obligations."

The mortgage of December 3, 1912, which attempted to secure to the Bank not only the payment of the interest due on the $4600, but also the interest on that interest, in view of these provisions is clearly void. It amounts to nothing more nor less than an attempt to secure a greater rate than twelve per cent. on the mortgage for $4600. If it sued for the interest due on the $4600, it could only have secured six per cent. on the amount from the time the complaint was filed, but not before. The act cited (Sec. 4175) imposed on the lender the penalty of the loss of all the interest, where he attempts to evade the law, and makes any proceeding to enforce the contract void, insofar as it refers to the interest. The proceeding to enforce this mortgage should not have been allowed to proceed in view of the Bank's evidence with regard to the nature of the consideration for the mortgage.

The Mortgage Law gave to the mortgage creditor the following rights, only, with regard to unpaid interest:

Art. 114. (Sec. 6798 Com. Stat.) "A mortgage created in favor of an interest paying debt shall secure to the prejudice of third persons, besides the capital, only the interest for the two years last past and such part as is due for the current year."

Art. 115. (Sec. 6799 Com. Stat.) "After three years have elapsed from the time the loan began to accumulate interest which remains unpaid, the creditor may demand that the mortgage created be enlarged on the same mortgaged property, for the purpose of securing the interest corresponding to the first of said years, but only in case the obligation to pay part of the interest is past due and the debtor has failed to satisfy it.

If the creditor makes use of his right after three years have elapsed, he may demand that a mortgage be extented to cover all the interest which at the time of said extension was not covered by the first mortgage; but this can in no case prejudice a mortgage created in favor of a person who had previously and after the two years acquired an interest in the mortgaged property." (Our translation.)

The only way in which these sections can be construed so as to stand in connection with the present Interest Law, and which we submit is their proper interpretation under any circumstances, is this. The mortgage created no lien on the real property for any interest beyond the two last years and the current year, but provides that by a subsequent contract between the parties a lien on the property to secure the payment of unpaid interest might be created. The amount of interest, however, is not to draw interest. The law nowhere intimates that this extension of the mortgage shall secure the payment of interest on the interest, but merely shall create a lien for the unpaid interest. The Bank could have obtained

from Landron such a mortgage if three years had elapsed from the time the unpaid interest began to accumulate, for the whole amount of the interest due, or if the three years had not wholly elapsed only for interest corresponding to the first of such years. But note that the law expressly provides that this could not be done if it would prejudice the rights of a mortgage creditor acquired after the two years. This was the trouble with the Bank's taking an extension of the Landron mortgage to secure the payment of unpaid interest. Sweet & Wilcox had acquired a mortgage on the property after the two years, and an extension of the mortgage to secure the unpaid interest would not affect them. Furthermore such an extension mortgage, as we have seen would *not* carry interest on the interest. Hence the plan of making a document that would appear to be a mortgage to secure cash actually paid to the debtor by the creditor Bank.

By the Interest Law above set forth, the Bank, for its cupidity is penalized by the loss of interest. This does not mean the interest on the $1709; it means the entire interest on the $4600 represented in the $1700 transaction, and, of course, the interest on that interest, for this is the usurious transaction. And since the plaintiff, the only party who could tell the Court exactly how much of the $1700 was interest, has failed to do so clearly, the Court cannot estimate the amount but must conclude that the whole amount represents interest.

For all of which reasons we respectfully submit that no decree should have been entered as to the mortgage for $1700 nor for the interest thereon nor for costs and attorney's fees.

The argument concerning usury in the Bank's Brief (pp. 61-62) is based entirely upon construction of state statutes making voidable only the excess interest and not the total interest. The Porto Rican usury statute is so drawn as to void all interest.

Answering Point V. Bank's Brief.

The Bank (p. 54) complains of the order of dismissal of the Court of Appeals, saying that in any event it was entitled to a foreclosure of the $4600 mortgage. Wilcox, as a second mortgagee was entitled to have an opportunity to protect his lien by buying in on a proper foreclosure suit or by paying only the amount of lawful claims ahead of his. As a practical matter, the Court knows that his equities cannot be protected in the present litigation by affirming the foreclosure decree and amending it. Equity demands that Wilcox and the Bank be placed in *statu quo ante* January 14, 1913. This is the effect of the decree of the Circuit Court of Appeals. We are not here concerned with Landron's interest. The Bank, if it is so advised, may hereafter bring such proceedings as it sees fit to foreclose its $4600 mortgage.

Answering Point VI. Bank's Brief.

The District Court erred in dismissing the Bill of Review filed by Wilcox after he had procured a decree cancelling the deed of January 14, 1913, upon which the Bank's bill was brought. The District Court and the Bank both seem to feel that Wilcox committed a tactical blunder in dismissing the cancellation suit as to the Bank, taking a *pro confesso* decree against Landron. The Bank had no right except by subrogation or its equivalent, but it was a party in interest and had an opportunity to stay in that litigation as an intervenor or otherwise. Wilcox could not have forced it out, had the Bank desired to litigate the issues raised. Upon cancellation of the deed as against Landron the foundation for the Bank's foreclosure decree was taken away.

CONCLUSION.

We submit that this appeal should be dismissed (with costs) for lack of jurisdiction and, in any event, the decree of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,

Jose R. F. Savage,
San Juan, Porto Rico, and
Ben A. Matthews,
New York City.
Solicitors for Wilcox, Appellee.

October 4, 1920.

SUPREME COURT OF THE UNITED STATES.

No. 91.—October Term, 1920.

El Banco Popular de Economias y Prestamos de San Juan, P. R., Appellant,
vs.
Elias B. Wilcox.

Appeal from the United States Circuit Court of Appeals for the First Circuit.

[February 28, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

In a suit in the United States District Court for Porto Rico where the appellant, a bank incorporated in Porto Rico was plaintiff, and the appellee a citizen of the United States was defendant, a final decree in favor of the bank was rendered, and from that decree the defendant took the case to the Circuit Court of Appeals for the First Circuit.

Upon a reversal of the decree in that court, the bank brought this appeal, and upon a motion to dismiss for want of jurisdiction, we are required to determine its right to do so. The appellant, not denying that the jurisdiction of this court to review judgments or decrees of the District Court for Porto Rico in cases such as the present one was taken away by the Act conferring upon the Circuit Court of Appeals of the First Circuit appellate power over that subject (Act of Jan. 28, 1915, c. 22, sec. 1; *id.*, sec 2, amending secs. 128 and 238 Jud. Code; *id.*, sec. 3, repealing sec. 244 Jud. Code; 38 Stat. 803, 804), nevertheless insists that by virtue of the jurisdiction of this court to review judgments and decrees of the circuit courts of appeals, the power taken away is in substance preserved if only successive appeals be resorted to. This rests upon the proposition that as the Act transferring the jurisdiction from this to the circuit court of appeals brought this case within the jurisdiction of the latter court, it hence subjected the decree in this case to the test of finality and the right of review

provided in section 128 of the Judicial Code controlling those subjects. While if the section be considered superficially the argument is plausible, its unsoundness becomes apparent by the briefest examination of the context and genesis of the section. Virtually every word of the section relied upon to establish that the decree was not final and to justify the asserted right to review it in this court depends upon limitations expressed in the Judiciary Act of 1891 and which were intended to carry out the great purposes of that Act, to distribute the appellate power of the courts of the United States in the proper sense and were therefore inapplicable to the Porto Rican court. To illustrate, one of the broad distinctions made in the distribution of appellate power under the Act of 1891 depended upon whether the jurisdiction of the Federal court as fixed by law was exclusively called into play because of diverse citizenship, in the constitutional sense, or whether the jurisdiction was invoked because, aside from diverse citizenship, there existed a Federal right or question; a judgment being in one case made final in one court where it was not in the other, and also being subject to one method of review in the one and a different in the other. Thus the proposition is, that because by Act of Congress jurisdiction was conferred upon the circuit court of appeals to review a judgment of the Porto Rican court, therefore by the mere exertion of that jurisdiction the Porto Rican judgment was brought under the control, as to finality and review, of provisions having no possible application or relation to it.

The Act of Congress by which jurisdiction was conferred upon the Circuit Court of Appeals for the First Circuit additionally makes clear the misconception upon which the argument rests. At the time that Act was passed the jurisdiction of this court to review the Porto Rican court embraced two classes of cases, the one involving enumerated Federal questions, in the true sense, and the other where the power depended upon the amount involved. Sec. 244 Jud. Code. But the transferring Act did not divest this court of appellate jurisdiction over the Porto Rican court, but on the contrary preserved its authority, although in some respects limiting and in others enlarging it, and transferred to the circuit courts of appeals appellate jurisdiction in all cases other than those in which jurisdiction by direct appeal was conferred upon this court, unless otherwise provided by law,—a result which clearly negates that it

was contemplated that a right to successive appeals should exist, and which moreover indisputably shows that it was the purpose of Congress not to give the circuit court of appeals an authority which it could not exert compatibly with the distribution of Federal appellate judicial power made by the Act of 1891.

Indeed, we might well have spared ourselves the duty of expressing the considerations we have stated since the proposition relied upon is virtually foreclosed by the ruling in *Inter-Island Steam Navigation Co.* v. *Ward*, 242 U. S. 1. There a judgment of the Circuit Court of Appeals of the Ninth Circuit, affirming a judgment of the Supreme Court of Hawaii, was brought here by appeal on the theory of the right to successive appeals now relied upon. Coming to consider whether there was jurisdiction to entertain the appeal, and pointing out a reservation of jurisdiction in this court made by the Act transferring authority to the Circuit Court of Appeals of the Ninth Circuit to review the Hawaiian court, similar in character to that made with reference to the Porto Rican court which we have previously noticed, it was held that there was no jurisdiction in this court, (a) because of the inferences properly to be drawn from the reservation in the Act of Congress just referred to; (b) because of the impossibility of supposing that jurisdiction was taken away from this court and yet virtually restored by successive appeals, and (c) because of the difference between the systems of judicature obtaining as to the courts of the United States under the Constitution and those of Hawaii making the right to review in the one depend upon legislative limitations not governing as to the other.

It follows from what we have said and from the principles sustained by the ruling in the case just stated that we are without jurisdiction to entertain the appeal which is before us, and it must be and is, therefore,

Dismissed for want of jurisdiction.

A true copy.

Test:

Clerk Supreme Court, U. S.